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Asbestos Case Tracker

2016 Compendium

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Asbestos Case Tracker

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Bankruptcy Decisions

Bankruptcy Court Grants Asbestos Defendants Limited Access to Bankrupt Trust Exhibits

(U.S. Bankruptcy Court for the District of Delaware, November 8, 2016)

Honeywell International, Inc. who was joined by Ford Motor Company moved for an order authorizing "any entity . . . to access, inspect, copy and receive copies of … any and all of the 2019 Exhibits filed with the Court in compliance with the 2019 Order or *Bankruptcy Rule 2019*." In other words, Honeywell and Ford were seeking an order allowing it access to the statements and exhibits which asbestos claimants submitted in the captioned cases pursuant to *Rule 2019 of the Federal Rules of Bankruptcy Procedure* (the Bankruptcy Rules). The North American Refractories Company Asbestos Personal Injury Settlement Trust Advisory Committee (NARCO TAC), among others, objected to this motion.

The actual *Rule 2019* Exhibits include the following: (1) the names and addresses of the clients of the submitting attorney; (2) exemplars or actual copies of the relevant retention agreements; (3) identification of disease; (4) claim amounts if liquidated; (5) sometimes full or partial social security numbers; (6) sometimes medical records, with information including full or partial social security numbers; family histories (including causes of death of family members), results of physical examinations, chest x-rays, and lung function tests, and other similarly sensitive medical information; and (7) sometimes other records that the law firm maintained in connection with or commingled with the required information.

In its moving papers, Honeywell argued for access to these exhibits so they could ensure that the purpose of the NARCO trust, which is to promptly pay holders of "valid" claims, is fulfilled, and that Honeywell appropriately compensates asbestos plaintiffs in the tort system, to the extent such plaintiffs have valid claims. In addition, Honeywell intends to produce the 2019 Exhibits to the NARCO Trust to be used in connection with the NARCO Trust's own review of claims that it receives from asbestos claimants. Honeywell argued they have a very real and timely need to access the 2019 Exhibits and use them in furtherance of its efforts to ferret out invalid or fraudulent asbestos claims. Lastly, both Honeywell and Ford both made it clear that they also intend to use the *Rule 2019* Exhibits for lobbying purposes. However, neither movant provided the court with additional details as to these lobbying efforts.

This court reasoned that Honeywell and Ford were both seeking limitless access of these exhibits from the court for use outside judicial proceedings and found no precedent for this. In the Third Circuit, access to court records has been denied where court files could potentially become a vehicle for improper purposes. [Citation Omitted]. The court could not find any Third Circuit case law holding or otherwise considering whether lobbying is a proper purpose under *Rule 2019*.

For these reasons, on November 8,2016, the court granted limited access to the use of the *Rule 2019* Exhibits by Honeywell and Ford, and specifically held they may not be used for "lobbying efforts.". Honeywell and Ford may use the *Rule 2019* Exhibits to investigate fraud in the claims process and may share the information with the NARCO Trust in an aggregate format. In other words, Honeywell and Ford may not share the identity of individuals by name or other identifying means with the NARCO Trust. Honeywell and Ford were granted three months to complete their work and must comply with a Protocol Order which requires the destruction of the *Rule 2019* Exhibits at the conclusion of the work. Honeywell's and Ford's efforts will be at their expense and the court will appoint a party to oversee the production of the *Rule 2019* Exhibits.

Read the full decision here.

Read the full order here.

Certification of Class for Unmanifested Asbestos Claims in Bankruptcy Court Denied

(U.S. District Court for the District of Delaware, September 28, 2016)

Debtors filed voluntary petitions for relief in the United States Bankruptcy Court; certain debtors' subsidiaries have potential liability related to former employees' alleged exposure to asbestos in power plants owned or operated by debtors' predecessors. The bankruptcy court issued an order setting a bar date for all asbestos claimants, establishing requirements for proofs of claim for manifested and unmanifested asbestos claimants, and notice procedures. Appellants filed a motion seeking to have the court, among other things, certify a class of persons holding unmanifested asbestos claims. The court denied the motion and this appeal followed. The district court found that the bankruptcy court did not abuse its discretion in ruling that the class would not be superior to other methods of adjudication.

Appellants argued that the bankruptcy court committed legal error by using the wrong comparator, claiming that the correct comparison for the superiority analysis was not the notice and bar date procedure set up by the court, but rather individual litigation by future claimants as they manifest, beginning with proceedings in the bankruptcy court to determine whether the claims were discharged. However, this was the comparator the court used; the court's discussion expressly considered individual litigation as compared to the proposed class proof of claims.

The superiority consideration required a court to compare the proposed class to other available methods for fairly and efficiently adjudicating the controversy. Here, the bankruptcy court considered both efficiency and fairness, particularly with its elaborate notice procedure. "Appellants attempt to rebut this and to support their efficiency argument by arguing that, in the coming decades, 'the Courts could conceivably be flooded with thousands' of suits filed by currently unmanifested claimants … Appellants provide no support for this claim, however, and an unsubstantiated claim about the potential number of future lawsuits cannot serve as the basis for finding abuse of discretion on the efficiency prong."

Regarding fairness, appellants argued that the alternative to the proposed class would involve unfair and insurmountable burdens to individual claimants. However the bankruptcy court found that the notice procedure was successful, and following appellants' procedure would amount to an end-run around the bar date, because the whole point of the bar date goes away because everyone would be covered. Certifying the proposed class would have the effect of allowing class members to bring suit whenever they chose, which was precisely opposite of Third Circuit law.

Read the full decision here.

Appellate Court Grants New Trial Due to Lower Court's Error on Jury Charge as to "Recklessness Standard"

(Supreme Court of New York, Appellate Division, Fourth Department, July 8, 2016)

In the matter of the Estate of Lee Holdsworth, in the Supreme Court of New York, Erie County (Lower Court), judgment was entered against the defendant Crane Co. upon a jury verdict finding that Crane Co. was 35 percent liable for the damages arising from injuries sustained by Lee Holdsworth (the plaintiff's decedent) as a result of exposure to asbestos-containing products used as component parts with the valves that defendant produced. The jury also determined the defendant acted with reckless disregard for the safety of the plaintiff's decedent. This important determination means defendant is jointly and severally liable for 100 percent of the damages. *See CPLR 1601(1); 1602(7).* Crane Co. appealed.

The Fourth Department Appellate Division ordered that the judgment was unanimously vacated on the law, a prior order was modified on the law by granting a post-verdict motion in part, setting aside the verdict in part, and granting a new trial on the claim that defendant Crane Co. acted with reckless disregard for the safety of the plaintiff's decedent Lee Holdsworth. The Appellate Court supported this decision with the following:

The Lower Court erred in instructing the jury on the plaintiff's claim that the defendant acted with reckless disregard for the safety of the plaintiff's decedent in accordance with the language set forth in *Matter of New York City Asbestos Litig. (Maltese) (89 NY2d 955, 956-957)*. Although the Lower Court used the charges set forth in the New York Pattern Jury Instructions, this specific jury charge does not accurately reflect the standard set by the Court of Appeals in *Maltese* because the charge in the Pattern Jury Instructions in effect reduced the plaintiff's burden of proof on her claim that defendant acted with reckless disregard for the safety of the plaintiff's decedent.

The Appellate Court also rejected defendant's contention that the apportionment of 35 percent liability to defendant is against the weight of the evidence and reasoned that it is axiomatic that a verdict may be set aside as against the weight of the evidence only if "the evidence so preponderated in favor of the defendant that the verdict could not have been reached on any fair interpretation of the evidence. [Citation Omitted]. In this case, the Lower Court properly determined that defendant did not meet its burden of establishing the equitable shares of fault attributable to other tortfeasors in order to reduce its own liability for damages.

Lastly, the Appellate Court rejected defendant's contention that the Lower Court failed to require the plaintiff to apply for recovery from trusts set up pursuant to 11 USC § 524 (g) for three bankrupt nonparty tortfeasors prior to entering judgment against defendant. It was noted that *General Obligations Law § 15-108* does not apply to reduce defendant's liability inasmuch as there has been no settlement between the plaintiff and the respective trusts. [Citation Omitted]. Thus, the court did not have express authority to require the plaintiff to apply for proceeds from the respective trusts before judgment was entered.

Read the full decision here.

Plaintiff Could Not Side-Step Manville Trust by Directly Suing Defendant Where Claim was a Pre-Petition Claim Subject to Discharge by Bankruptcy

(U.S. Bankruptcy Court for the Southern District of New York, June 30, 2016)

The plaintiff, Lynda Berry, filed an asbestos lawsuit in Louisiana against Graphic Packaging International for mesothelioma due secondary exposure from her husband's work at the Manville Forest Products (MFP) mill from 1961-2010. The plaintiff's petition included claims against Manville for asbestos it produced, and claims against Graphic for negligently maintaining the premises. Graphic filed an emergency motion for enforcement of the bankruptcy confirmation orders of the Johns-Manville Corporation and MFP. Graphic argued it was a successor of MFP, and as such, the plaintiff must first pursue her asbestos claims against the Manville Personal Injury Trust. The plaintiff argued her claims were not discharged or enjoined by the MFP confirmation order, MFP was not a beneficiary of the Manville confirmation order or channeling injunction, Graphic waived its right to enforce the bankruptcy confirmation orders and injunction, and she did not receive due process.

The bankruptcy court granted Graphic's motion for an order enjoining the plaintiff's state law claims against Graphic as successor to MFP. In so holding, the court stated: "Ms. Berry's lawsuit against MFP is merely an attempt to side-step the Manville Trust in order to recover more than other similarly situated asbestos victims by suing Manville and its subsidiaries directly. This is not merely unfair to the other victims, it is an attempt to sue on rights she does not have." The court found that the plaintiff held a future asbestos claim, subject to the injunction in the Manville Plan and Confirmation Order.

The court provided a detailed description of the history of Johns-Manville, asbestos, and asbestos litigation. On August 26, 1982, Manville and 20 of its subsidiaries filed for protection under chapter 11 of the Bankruptcy Code; MFP was one of these original Manville debtors. After MFP confirmed its reorganization plan, it changed its name to Riverwood International Corporation, which later merged with Graphic in 2003.

Pursuant to the plain language of MFP's bankruptcy confirmation order, any direct claim the plaintiff had against MFP was a pre-petition claim, subject to discharge by MFP's Plan. MFP's confirmation order discharged MFP from all unsecured, pre-confirmation debts, and likewise enjoined all entities whose debts were discharged from pursuing any litigation to collect such discharged debt. Further, the federal courts developed four tests to determine when a pre-petition bankruptcy claim arose — the "accrual test," "conduct test," "pre-petition relationship test," and, occasionally, the "fair contemplation test." The court examined holdings in other bankruptcy cases involving future tort claimants to determine which approach to use, and applied the pre-petition relationship test as set forth by the Second Circuit — a sufficient relationship was formed when the claimant was exposed to asbestos as a result of the debtor's allegedly tortious conduct. The relevant inquiry was when the injured party was exposed to the product — in this case, from 1961-2010. Although the plaintiff argued a continuing theory of exposure, the substantial injury-producing exposures were, by the plaintiff's own admission, more likely to have occurred prior to the confirmation date of August 26, 1982. Addressing the plaintiff's due process claims, the court found that MFP complied with the due process requirements outlined in prior case law. Further the Manville Plan preserved her claim by channeling that claim into the Trust. In so finding the court provided detailed summary of the design, purpose, and administration of the Trust. Finally, the court found that Graphic did not waive its right to rely on the confirmation orders because bankruptcy discharge was not an affirmative defense that could be waived.

Read the full decision here.

Although Plaintiff's Claims Within 1986 Manville Settlement Order, Case Remanded to Bankruptcy Court to Determine If Plaintiff Received Due Process

(U.S. District Court for the Southern District of New York, March 14, 2016)

The plaintiff, Salvador J. Parra, Jr., developed asbestosis after working as an insulator and sued Marsh USA, Inc., an insurance broker, and others. Marsh filed a motion in the bankruptcy cases of Johns-Manville, arguing it was relieved of liability for the plaintiff's claims. The bankruptcy court granted the motion, and the plaintiff appealed. The district court affirmed in part, reversed in part, and remanded the case to the bankruptcy court for further proceedings. Marsh was Manville's primary insurance broker from 1944-1982. Manville had sued Marsh, alleging it failed to procure sufficient insurance coverage. In 1986, Marsh settled with Manville, and the bankruptcy court approved Manville's plan of reorganization. The insurance settlement order included a settlement fund, with a payment by Marsh that released all Marsh claims, even if they were not known, and an injunction against future Marsh claims. In this case, Marsh argued that Plaintiff's claims fell within this settlement order. The plaintiff filed a response, arguing various points.

The court started its analysis by stating that parties which do not receive adequate notice of a bankruptcy case cannot be bound by orders issued in that case. Special notice problems arose in asbestos cases due to the latency of the injury.

Although the plaintiff argued the bankruptcy court could not hold his claims were barred without holding an evidentiary hearing, there was no merit to the plaintiff's claims that Marsh was required to prove his claims were "inextricably intertwined" with Marsh's insurance relationship with Manville in order to establish that his claims fell within the scope of the settlement order. However, the court remanded the case to determine whether the plaintiff received sufficient due process in connection with entry of the 1986 orders. "While Parra cannot challenge the 1986 Orders on the basis of subject matter jurisdiction, there is no question that the bankruptcy court exceeded its subject matter jurisdiction in barring Parra's claims against Marsh. According to the Second Circuit opinion in Manville III, 'a bankruptcy court only has jurisdiction to enjoin third-party non-debtor claims that directly affect the res of the bankruptcy estate.' However, Parra's claims do not seek to collect from the assets of the estate — i.e., the insurance policy proceeds — but seek to hold Marsh liable for its independent wrongdoing, not Manville's. As such, Parra's claims do not seek to collect from the rest of the Manville chapter 11 estate, but are in personam claims for liability against Marsh."

Read the full decision here.

Bankruptcy Stay Lifted Against Defendant/Debtor to Allow Plaintiffs to Pursue State Law Claims

(U.S. Bankruptcy Court for the Northern District of Illinois, Eastern Division, February 10, 2016)

In this case, the defendant that used asbestos in some of its production while in business filed chapter 11. There remained 123 claims against the defendant and the defendant's proposed chapter 11 plan stated that the "liability issues will pass through the bankruptcy and be tried in non-bankruptcy courts having jurisdiction." The defendant objected to the Asbestos Committee's motion to lift the automatic stay, arguing the stay should remain in place pending plan confirmation.

In its analysis, the court applied the Fernstrom three-part balancing test that instructs courts to consider "(1) whether any great prejudice to either the bankruptcy estate or the debtor will result from continuation of the civil suit; (2) whether the hardship to the non-debtor party by maintenance of the stay considerably outweighs the hardship to the debtor; and (3) whether the creditor has a probability of prevailing on the merits." The court found in favor of the plaintiffs on all three factors and lifted the stay.

Read the full decision here.

Two Rulings From MDL Allow Previously Dismissed Asbestos Claims to Proceed Against Various Ship Owners Despite Previous Dismissed Actions Not Listed as Assets in Bankruptcy

(U.S. District Court for the Eastern District of Pennsylvania, January 25, 2016)

In a follow-up to six cases previously reported on in ACT, two more cases were decided in the United States District Court for the Eastern District of Pennsylvania. Both cases had started in the Northern District of Ohio, and were transferred to the MDL 875 in the Eastern District of Pennsylvania. In both cases, the plaintiffs brought claims against various ship owners represented by Thompson Hine LLP, and all alleged asbestos exposure while working on ships. All cases were administratively dismissed; after dismissal, the plaintiffs filed for bankruptcy, and did not list their asbestos claims as assets. After bankruptcy was discharged, the claims were reinstated, and defendants filed summary judgments, arguing that the plaintiffs' claims were: (1) judicially estopped because the claims were not listed on the bankruptcy; (2) the claims belonged to the bankruptcy trustee, not the plaintiffs. The court denied defendants' motions for summary judgments.

The court found that: (1) the plaintiffs took irreconcilably inconsistent positions in not listing the claims as assets during bankruptcy, but then pursued the same claims that they represented did not exist; (2) But, this was not done in bad faith, because the plaintiffs could not have known that years later these claims would resurface. Further, although the bankruptcy trustees were the proper plaintiffs, the court allowed for time for the proper plaintiffs to be substituted in these actions.

Read the first decision here. | Read the second decision here.

Bare Metal/Component Parts Decisions

Federal Court Outlines Alternative Standard to Bare Metal Defense

(U.S. District Court for the Eastern District of Louisiana, October 4, 2016)

William Bell alleged routine exposure to asbestos while serving as an engine man, machinery repairman, and a machinist mate in the United States Navy in the 1960s. Bell further alleged he was exposed to asbestos both while serving at sea on four ships as well as while training at a land-based Navy facility in Idaho. After being diagnosed with mesothelioma in 2015, Bell sued various companies that manufactured a wide range of products including pumps, valves, condensers, compressors, and turbines located on the Navy vessels upon which Bell served. Each of those products was allegedly used in conjunction with asbestos components, but the defendants had varying involvement in the manufacture and installation of those asbestos components. Bell passed away in 2016, and his executor and brother ("the plaintiffs") further pursued wrongful death and survivorship claims.

The defendants (10 total) filed motions for summary judgment, alleging that the plaintiffs failed to establish that defendants made, sold, or otherwise controlled the asbestos components that released asbestos fibers that caused Bell's mesothelioma; or what is commonly known as the "bare metal defense." The defendants relied upon the Sixth Circuit's view that a manufacturer is not liable unless the manufacturer made, sold or otherwise controlled the precise aftermarket asbestos components that released the asbestos fibers. Because identification of that manufacturer is often nearly impossible, the Sixth Circuit's interpretation has "the practical effect of precluding recovery in most instances." [Citation Omitted]. Accordingly, defendants argued that this court should apply the Sixth Circuit's understanding of the bare metal defense and hold that a company can never have any liability for a product that it did not make, sell, or otherwise control.

In turn, the plaintiffs argue that the mere foreseeability that a company's product may be used in conjunction with asbestos gives rise to a duty to warn regarding another company's product. Further, the plaintiffs suggest that the court apply the somewhat narrower standard recognized by the Northern District of Illinois in Quirin, wherein a company has a duty to warn regarding the hazards of asbestos when the company makes "a product that, by necessity, contained asbestos components, where the asbestos-containing material was essential to the proper functioning of the defendant's product, and where the asbestos-containing material would necessarily be replaced by

other asbestos-containing material." [Citation Omitted]. The plaintiffs also relied upon decisions in several other jurisdictions that rejected the Sixth Circuit's view of the bare metal defense.

Therefore, a prerequisite to deciding defendants' motions, this Federal Court was tasked to determine whether it agreed with the Sixth Circuit's view of the bare metal defense or whether or agreed with the courts rejecting the Sixth Circuit's view. In the end, this court ultimately disagreed with both sides of the split in authority. Rather, moving away from a one-size-fits-all test, the court applied a more granular standard addressing both (A) the liability of the manufacturer that incorporates asbestos into its finished product and (B) the liability of a bare metal component part manufacturer:

(A) Liability of Manufacturer That Incorporates Asbestos Into Its Finished Product

When a plaintiff alleges liability against a manufacturer of a finished product that incorporates asbestos components, the extent of the manufacturer's liability primarily turns on whether (i) the harm was caused by a component added by the manufacturer or (ii) an aftermarket component added by the user. If the harm is caused by an asbestos component added to the product by the manufacturer, then, through the uncontroversial application of products liability law, the manufacturer may be liable in both strict liability and negligence actions. However, if the harm is caused by an aftermarket asbestos component, the manufacturer is not liable in a strict products liability action. Likewise, if the harm comes from an aftermarket asbestos component, the manufacturer may also face liability under a negligent misrepresentation theory if the manufacturer negligently recommended the use of a defective aftermarket product.

(B) Liability of A Bare Metal Component Part Manufacturer

When a plaintiff alleges liability against a manufacturer of a bare metal component part that was used in conjunction with an asbestos product, then the manufacturer's liability turns on whether the manufacturer did something beyond manufacturing of the component part that was used in conjunction with the asbestos. If a component part manufacturer simply designs a component to its buyer's specifications, and does nothing else, then the manufacturer faces no liability unless the component part is defective in itself. However, if the component part manufacturer does something beyond simply designing and manufacturing a component part, then the manufacturer may be liable under one of the following theories:

(i) If the bare metal component part manufacturer "is substantially involved in the integration of the component into the design of the integrated product, the component seller is subject to liability when the integration results in a defective product and the defect actually causes harm to the plaintiff." [Citation Omitted]. The component part manufacturer's liability in such a circumstance would lie in both negligence and strict liability.

(ii) If the bare metal component part manufacturer supplies directly or through a third person a component part for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, then the manufacturer is subject to liability for physical harm resulting to them. However, a manufacturer's liability in such circumstances would lie only in negligence.

(iii) If the bare metal component part manufacturer recommends the use of a hazardous part in conjunction with the manufacturer's component part, then the manufacturer can face liability if the recommendation negligently gives false information to another, and "harm results" to either (1) the recipient of the information or (2) "third persons" that the manufacturer should expect to be put in peril by the negligent recommendation. Here, the manufacturer is liable only in a negligence action.

Finally, if the component part manufacturer does not make a bare metal product, but instead makes a component part containing asbestos, the component part manufacturer can be liable for that asbestos.

Due to this court's alternative view of the bare metal defense, all motions were denied without prejudice. With this new standard in place, the court gave the parties the ability to re-brief their summary judgment contentions. New dates were issued in that defendants should re-file their summary judgment briefs no later than October 18, 2016 and the plaintiffs' responses due no later than November 4, 2016.

Read the full decision here.

Federal Court Rejects Argument That Manufacturer Cannot Be Liable for Asbestos-Containing Component Parts

(U.S. District Court for the Eastern District of Pennsylvania, September 28, 2016)

The plaintiffs filed suit in the Court of Common Pleas, First Judicial District, Philadelphia County, against various defendants claiming that the decedent, who had been employed since the 1950s as a millwright in multiple power plants and steel mill factories, developed work-related malignant mesothelioma from exposure to asbestos and to products containing asbestos.

This state action was ultimately removed to federal court and became part of Multidistrict Litigation-875 in the Eastern District of Pennsylvania. Here, the plaintiffs specifically alleged that defendant Crane Co. manufactured, produced, sold, and/or supplied valves to the decedent's various worksites. Following an eight-day trial against only defendant Crane Co. (all other defendants were dismissed or settled), the jury found in favor of the plaintiffs and awarded $1,085,000 in total damages; $835,000 in compensatory damages to the decedent's estate under the Survival Act, 20 Pa. C.S. § 3371, et seq., and $250,000 for loss of consortium. The jury apportioned liability amongst specific defendants and, particularly, assessed Crane with 30 percent liability for damages.

Following the verdict, Crane filed a motion for judgment as a matter of law contending (1) it owed no legal duty to the decedent to warn of the hazards of asbestos-containing materials made and sold by third parties Crane had no control over; and (2) the plaintiffs did not establish causation and failed to prove that the decedent encountered asbestos-containing materials that Crane manufactured or supplied. Crane further argued that under Pennsylvania law, a manufacturer cannot be held legally responsible for asbestos-containing components that it did not make, sell, or otherwise place in the stream of commerce; an argument the defendant has made numerous times, and each time the argument has been rejected based upon the holding of *Schwartz v. Abex Corp.*, 106 F. Supp. 3d 626 (E.D. Pa. 2015).

The court dismissed Crane's first two arguments as without merit pursuant to the law of the case doctrine. Here, the court found that Crane previously litigated these points within prior motion practice. More specifically, Crane relied upon the identical case law and legal arguments that was considered and rejected within these prior motions. Therefore, Crane was not entitled to re-litigate or have this court reconsider these same legal issues. That is, under this doctrine, "once a court decides an issue, the same issue may not be re-litigated in subsequent proceedings in the same case." [Citation Omitted].

As to Crane's second argument, the court also found this to be flawed, noting that under *Schwartz*, a product manufacturer can be held liable for negligently failing to warn about asbestos hazards of component parts used with its product which it neither manufactured nor supplied if the product manufacturer, such as Crane (1) knew its product would be used with an asbestos-containing component part of the type at issue, (2) knew that asbestos was hazardous, and (3) failed to provide a warning that was adequate and reasonable under the circumstances. In this case, the facts established that Crane conceded that it supplied the valves at issue; Crane knew that asbestos was hazardous; and that it had not provided any warning regarding the use of asbestos in its valves. Further, Crane's corporate representative testified that they manufactured valves that incorporated asbestos-containing gaskets and packing, as well as valves that did not contain asbestos components, depending on the customer's specific preference.

Taking the above into consideration, the court ultimately found that while the plaintiffs may not have presented actual direct evidence that Crane supplied asbestos-containing valves to any of the decedent's work sites, the totality of the circumstantial evidence supports the jury's finding that Crane did. Accordingly, Crane's motion for judgment as a matter of law was denied.

Read the full decision here.

Manufacturers of Generators, Turbines and Boilers Granted Summary Judgment on Bare Metal Defense

(U.S. District Court for the District of Delaware, August 29, 2016)

The plaintiffs brought this action against several defendants for alleged exposure to asbestos and development of mesothelioma while working as a ship fitter at several shipyards from approximately 1964 until 2014. Defendants Cummins, CBS, and Foster Wheeler moved for summary judgment. Specifically, the plaintiff alleged that he rolled out amosite and cut it with an electric knife to make A-Cloth pads at the shipyards. He also stated that he had insulated various pieces of equipment including turbines, boilers, and generators. As to the defendants, Malone claimed that he had worked with Cummins generators, Westinghouse turbines, and Foster Wheeler boilers.

The court began its analysis with the standard for summary judgment. A movant is entitled to summary judgment when "there is no genuine dispute as to any material fact." The burden is on the moving party. Specific to Mississippi law, the standard is "frequency, proximity and regularity" for determining asbestos related claims. The plaintiff took the position that this standard is relaxed in mesothelioma claims. However, the authority cited by the plaintiff to support this claim was not based on Mississippi law. The court additionally gave guidance for strict liability cases in that Mississippi utilizes the Mississippi Product Liability Act "MPLA". The MPLA mandates that a product may be defective if it does not have adequate warnings. However, "manufacturers and sellers only have a duty to warn dangers known at the time the product leaves his or her control." The court also pointed out that although Mississippi had not yet addressed the bare metal defense, this court had previously found that based on the MPLA it was "reasonably likely that the Supreme Court of Mississippi would follow the majority of jurisdictions" in precluding defendant liability under the bare metal defense. Relying on the *Dalton* case, the bare metal defense precludes liability caused by asbestos components "where the defendant neither manufactured nor supplied the product that allegedly caused the the plaintiff to be exposed." The plaintiffs took exception and argued that *Dalton* did not apply because there was evidence that the defendants' products required asbestos insulation for their products. The court disagreed with the plaintiff and declined to expand the duty to warn on the issue of foreseeability.

Cummins: Cummins argued that summary judgment was appropriate because the plaintiffs failed to meet the frequency, proximity and regularity standard. The plaintiff again took the position that causation is a less rigid standard in mesothelioma cases. Honing on the plaintiff's lack of identification of specific generators on 10 ships and in the light most favorable to the plaintiff, the court recommended the granting of summary judgment. The court also found the bare metal defense applicable to Cummins as nothing in the record suggested that Cummins supplied the asbestos used to insulate its products. More importantly, nothing showed that Cummins *required or instructed* the use of asbestos on the piping of its generators.

CBS: CBS also moved for summary judgment, based on the plaintiffs' failure to establish exposure to any Westinghouse asbestos containing product. The plaintiff disagreed and took the position that CBS was liable for the asbestos insulation that Malone worked on that was applied to the Westinghouse turbines at the tops and bottoms. However, Malone's own testimony showed that he could not identify working with a Westinghouse turbine on any particular ship. The court also stated that the bare metal defense was applicable for CBS based on the *Dalton* case. Despite finding that a factual issue existed with respect to the government contractor defense, the court recommended the granting of summary judgment.

Foster Wheeler: Foster Wheeler moved for summary judgment arguing that there is no issue of material fact in dispute as to whether Mr. Malone was exposed to an asbestos-containing product of Foster Wheeler. Here, the plaintiff testified that he could not recall how many Foster Wheeler boilers he may have worked on at Ingalls Shipyard. Further, Malone stated on cross examination that he did not believe he was exposed to asbestos from a Foster Wheeler product. The court found this to be dispositive on the issue of causation and recommended granting summary judgment. Further, the Court stated that the Bare Metal Defense was applicable as the record showed that the boilers arrived "bare metal" at the shipyard and that nothing suggested that Foster Wheeler supplied the insulation that was used on the boilers. The court declined to grant summary judgment as to Foster Wheeler's government contractor defense.

Read the full decision here.

Various Manufacturers Granted Summary Judgment Under Mississippi Law, Including Acceptance of Bare Metal Defense

(U.S. District Court for the District of Delaware, July 13, 2016)

The plaintiff, Robert Lee Winhauer, commenced this action alleging asbestos exposure from his personal work on his automobiles from the 1940s through the 1990s, from his work at the Ingalls Shipyard in Pascagoula, Mississippi from 1965 to 1976 and while working at Courtaulds North America Rayon Staple Plant in Le Moyne, Alabama from 1977 to 1998. Nine defendants, John Crane, John Crane Inc. (JCI), Flowserve US Inc., Carver Pump Co. , Sterling Fluid Systems (USA) LLC, FMC Corp., Velan Valve Corp., Borg-Warner (D.I. 173), and Cleaver-Brooks Inc. moved for and were granted summary judgment dismissing the plaintiff's action.

In its decision, the court stated that the parties agreed that Mississippi substantive law applied to this diversity case. As such, the case was governed by the Mississippi Products Liability Act (MPLA). Pursuant to the MPLA, "a product may be found defective if it 'fail[s] to contain adequate warnings.' As such, manufacturers and sellers have a duty to warn of known hazards associated with the use of their products. However, manufacturers and sellers only have a duty to warn of dangers known to them at the time the product leaves his or her control. Plaintiff must show that at the time the product left the control of the manufacturer or seller, the manufacturer or seller knew or should have known about the danger, and 'the ordinary user…would not realize its dangerous condition.' The failure to warn must be the proximate cause of the injuries suffered. That causal link between the alleged injury and the inadequate warning is key to a plaintiff's claim." (Internal citations omitted). The court went on to assess the application of the bare metal defense and stated "Although Mississippi courts have not yet addressed the bare metal defense, this court has previously found that based on the MPLA, § 402A, and case authority that, 'it is reasonably likely that the Supreme Court of Mississippi would follow the majority of jurisdictions that have refused to find defendants liable for other manufacturers' asbestos products.'"

Regarding defendants Flowserve, Velan, Carver, JCI and Cleaver, the court granted summary judgment, since the "[p]laintiff did not produce any evidence whatsoever tending to establish exposure to these parties' products, Plaintiff cannot meet Mississippi's frequency, regularity, and proximity threshold product nexus requirement." Regarding Sterling, the court held: "There is a complete lack of evidence to show that Sterling supplied any asbestos-containing product or instructed its customers to insulate Peerless pumps with asbestos-containing products. Therefore, Plaintiff fails to meet his burden of establishing a prima facie case of product identification, exposure, and causation under Mississippi law, and summary judgment should be granted in Sterling's favor." The court likewise ruled that the record did not "reflect sufficient exposure to Peerless pumps under Mississippi product identification standards" in granting FMC's motion. Crane's motion was granted on the bare metal defense and the court stated "under the bare metal defense, Crane is not responsible for asbestos-containing products applied to valves that Crane did not manufacture, sell, or distribute." Finally, Borg's motion was granted as the plaintiff's testimony was inconsistent and showed that at most he may have worked with one asbestos-containing Borg clutch. The court found that the testimony did "not amount to frequent, regular exposure that gives rise to an inference of causation."

Read the full decision here.

Lack of Evidence of Asbestos Replacement Parts Supplied by Crane for Use in Crane Valves Key to Granting of Summary Judgment

(U.S. Court of Appeals for the Eleventh Circuit, May 27, 2016)

The decedent died of mesothelioma; prior to his passing he filed a lawsuit in state court alleging exposure to asbestos while a production shift supervisor during his employment at a paper mill in Georgia. One defendant removed, and the action was transferred to MDL 875. Defendant Crane Co. filed for summary judgment, which was granted in part by the MDL court; however, it remanded to the Northern District of Georgia to determine whether the bare metal defense was available under Georgia law. Crane then moved for summary judgment on the basis of this defense, which was granted. The plaintiff appealed and the Eleventh Circuit affirmed.

Co-worker testimony established that some of the industrial valves at the mill were made by Crane, but no specific types of Crane valves were identified. All the valves required the removal and replacement of gaskets and packing. Testimony established the decedent's close proximity while gaskets were replaced, but not packing. No employee testified that the replacement gaskets and packing were made by Crane, but instead were supplied by third-party vendors. There was no evidence that the worn gaskets and packing were original to Crane valves.

Under Georgia law, an asbestos plaintiff must present evidence of exposure to asbestos-containing products for which the defendant was responsible. Here, a reasonable jury could conclude that the decedent was exposed to asbestos-containing dust from gaskets being replaced and used with Crane valves. However, there was no evidence

that these replacement parts were supplied by Crane. Thus, the plaintiffs failed to show that decedent's injuries were caused by asbestos parts supplied by Crane.

The plaintiffs argued that Crane was still liable because it negligently designed its valves to require the use of asbestos parts, and Crane failed to warn of the dangers of asbestos. Both of these arguments failed because the plaintiffs did not produce evidence of causation. The plaintiffs' injury must be the proximate result of a defect in the product which existed at the time sold. Here, the record does not show the type of Crane valve the decedent was exposed to, what the valve was used for, or whether the design of that valve specified the use of asbestos to function properly. Further, Crane's corporate representative testified that Crane valves did not require asbestos parts to properly function. "The mere fact that the gaskets on Crane Co. valves were replaced with asbestos-containing gaskets from third party vendors does not mean that Crane Co. designed and specified the use of only asbestos-containing gaskets for those valves, or that those valves required asbestos-containing gaskets to function … Without evidence demonstrating that Thurmon was exposed to a negligently designed Crane Co. valve (i.e. a valve that required asbestos-containing gaskets to function properly), a jury would be forced to speculate that Crane Co.'s negligence proximately caused Thurmon's injuries. However, "[s]peculation does not create a genuine issue of fact.'" Further, a successful failure-to-warn claim likewise requires causation, which plaintiff failed to establish.

Read the full decision here.

MDL 875 Clarifies That Absent Sufficient Exposure, Bare Metal Defense Applied in Maritime Law Bars Negligence and Strict Product Liability Claims

(U.S. District Court for the Eastern District of Pennsylvania, May 19, 2016)

In January 2013, this case was removed on the basis of federal question jurisdiction and assigned to MDL 875. The plaintiffs alleged asbestos exposure while serving in the Navy. Applying maritime law, the court granted summary judgments filed by Buffalo Pumps, CBS Corporation, Foster Wheeler, General Electric, IMO Industries, and Warren Pumps, based upon the bare metal defense. The plaintiffs appealed and the Third Circuit remanded the case to the MDL court to clarify whether it: (1) considered the negligence theory of liability; (2) concluded that the bare metal defense applied to negligence claims; (3) considered whether this case warranted application of the legal rationale by which other courts exempted negligence claims from being barred by the defense. The MDL court clarified as follows. The court offered a brief history of the application of the bare metal defense, noting that the MDL adopted this defense as applied by the Sixth Circuit in two separate maritime cases. In deciding to adopt these decisions, the MDL also noted that most of the asbestos cases pending in the MDL originated in the Sixth Circuit. While an MDL court applies the law of the Circuit in which it sits to matters of substantive federal law, at the time of this case the bare metal defense had never been squarely addressed by the Third Circuit, where this case originated. However, although this case was not part of the maritime docket, the application of federal maritime law must be consistent.

Thus, applying maritime law, the plaintiffs must show evidence of sufficient exposure to asbestos from a defendant's products in order to hold them liable under any theory of liability (whether strict liability or negligence). Maritime law imposed no duty to warn of the dangers associated with another manufacturer's product or component part. "For this reason, there can be no liability in negligence for asbestos exposure arising from a product (or component part) that a manufacturer defendant did not manufacture or supply (as a plaintiff will not be able to establish the breach of any duty to warn about that other product)." The court found that: "… in the maritime law regime, an asbestos product manufacturer defendant (1) has no 'duty' to warn about a 'product' that it did not manufacture or supply (and has a 'duty' to warn only about 'products' it manufactured or supplied), and, in keeping with this delineation of 'duty,' (2) can only be liable in negligence if there is evidence of (a sufficient amount of) exposure to asbestos from a 'product' it manufactured or supplied, in part because the 'causation' element is not satisfied (i.e., a 'breach' of the 'duty' to warn has only 'caused' the injury at issue where the alleged asbestos exposure has arisen from a 'product' for which the manufacturer defendant had a 'duty' to warn)." Therefore, absent evidence of sufficient exposure, maritime law barred both negligent failure-to-warn claims and strict liability claims.

Further, the MDL clarified that this case did not warrant application of legal rationales by which other courts exempted negligence claims from being barred by this defense, because these other courts analyzed state law, not maritime law. The MDL summarized its final findings: (1) it did consider the plaintiff's negligent failure-to-warn claims; (2) it determined that the defense bars both strict liability and negligent failure-to-warn claims, and; (3) maritime law's application of the defense rejected potential liability of a product manufacturer in negligence for products (or component parts) it did not manufacture or supply.

Read the full decision here.

Valve Manufacturer Granted Summary Judgment Under Maritime Law Where It May Have Recommended, But Did Not Provide, Asbestos-Containing Flange Gaskets

(U.S. District Court for the District of South Carolina, Charleston Division, January 27, 2016)

In this federal court case, it is alleged that the decedent, Thomas Dandridge, was exposed to asbestos while working as a pipefitter and coppersmith at the Charleston Naval Shipyard from 1965 to 1976. It was claimed that the decedent was exposed to asbestos from a variety of products, including flange gaskets used to link Crane Co. valves to pipe lines. The case was originally brought in the court of common pleas in Charleston County and was later removed federal court, where Crane moved for summary judgment.

Both parties agreed that the case was within the court's admiralty jurisdiction and maritime law applied. The court set forth the application of the "bare metal" defense and highlighted that under maritime law, a manufacturer is not liable for asbestos-containing component and replacement parts that it did not manufacture or distribute. The plaintiff did not allege that the decedent worked with Carne asbestos-containing gaskets. It was the plaintiff's argument that Crane had a duty to warn the decedent about asbestos exposure resulting from asbestos flange gaskets used with its valves and, as alleged by the plaintiff, that were recommend by Crane.

The court granted Crane's motion holding: "Here, plaintiff has failed to present evidence that Crane's manufacture and distribution of its valves made it inevitable that Dandridge would encounter asbestos-containing materials. At best, there appears to be evidence that some of Crane's valves were designed to be used with asbestos-containing flange gaskets in certain high-heat applications and that Crane recommended the use of such gaskets. While such evidence may suggest that some of Crane's valves 'required' asbestos-containing gaskets when used in high-heat applications and that Crane 'provided specifications' for such use, there is no evidence that Crane 'actually incorporated asbestos-containing materials into the products it sold." (internal citations omitted)

Read the full decision here.

Consolidation Decisions

Court Refuses to Consolidate Four In Extremis Cases for Joint Trial

(Supreme Court of New York, New York County, July 27, 2016)

The plaintiffs moved pursuant to CPLR 602 for an order consolidating four in extremis cases for a joint trial: Herman Anderson, Mercedes Abreu, Patrick Demartino, and Mario Scalera. Defendant Ford opposed consolidation in all four cases. Ingersoll Rand Co. and Aurora Pump Co. also opposed in the Demartino case, Weil-McClain opposed in the Abreu case, Genuine Parts Co. and ArvinMeritor, Inc. opposed in Anderson, and Pneumo Abex Corp. and Maremont Corp. opposed inAnderson and Demartino.

In denying the plaintiffs motion to consolidate, the court reviewed the "Malcolm Factors" — (1) common worksite; (2) similar occupation; (3) similar time of exposure; (4) type of disease; (5) whether plaintiffs were living or deceased; (6) status of discovery in each case; (7) whether all plaintiffs were represented by the same counsel; and (8) type of cancer alleged" (Malcolm v National Gypsum Co., 995 F2d 346, 350-351 [2d Cir 1993])."

The court noted that in contrast to the trend of NYCAL of consolidates asbestos trials, some state courts such as Ohio, Texas, Kansas, Georgia, and Michigan, do not consolidate asbestos trials absent the consent of all parties. The court explained that "[a]sbestos matters ought not be consolidated for trial simply because doing so has been the routine, nor should the terms "efficiency" and "judicial economy" be used to justify consolidation where experience has shown that it generally does not advance these lofty goals. The court also pointed out that state-of-the-art evidence may vary according to occupation, industry, or products; that medical evidence pertaining to mesothelioma in general takes less trial time than that spent on each plaintiff's medical history; and that the difficulty inhering in selecting a jury for a multi-plaintiff trial militates against consolidation.

Turning to each of the individual cases, the court found that the commonalities were outweighed by the differences and consolidation was not warranted. The Anderson exposure history was the only to predate OSHA and last more

than 30 years, requiring different state of the art evidence from the other plaintiffs and was a case that may require application of foreign law. Moreover, the Andersoncase was the only involving brake jobs, involved a site not common with the other plaintiffs, and did not involve exposures to asbestos-containing insulation. The Demartino case differed from the others because his mesothelioma was the only not diagnosed as pleural mesothelioma necessitating different and unique medical evidence. Demartino's occupation and worksite also differed. The Scalera case was the only to involve direct exposures to insulation and of the defendants in Scalera one was in no other actions. Finally, Abreu was the only case based on secondhand exposure through the work of another and the sole defendant remaining in the case was not in the other four cases.

Read the full decision here.

Duty to Warn Exists for Manufacturer of Products Required to be Used With Third Party Asbestos-Containing Products

(New York Court of Appeals, June 28, 2016)

Matter of New York City Asbestos Litigation (Dummitt v A.W. Chesterton, et al.), June 28, 2016

The plaintiff, Doris Kay Dummitt, filed suit in the New York Supreme Court, alleging her husband, Ronald Dummitt, was diagnosed with and passed away from mesothelioma from asbestos exposure as a result of work as a Navy boiler technician from 1960 to 1977. Plaintiff commenced this negligence and strict liability claim against Crane Co. and various other defendants who manufactured asbestos-containing gaskets, packing and insulation. In the course of his duties in maintaining naval steam pipe systems, Dummitt worked on Crane's valves, on which were installed asbestos-based gaskets, packing and insulation. Those asbestos-bearing products were designed and manufactured by companies other than Crane. The plaintiff alleged that, because those components contained friable asbestos, the routine replacement process, which Dummitt completed numerous times, exposed him to carcinogenic asbestos dust.

The plaintiff's allegations include that, although the record shows Crane's valves did not contain asbestos or other hazardous materials, Crane's valves could not practically function in a high-pressure, high-temperature steam pipe system without gaskets, insulation and packing for the valve stems. The plaintiff argues, as Crane knew, because the high temperatures and pressures in the steam pipe systems at issue caused asbestos-based gaskets and packing to wear out, Crane's customers, including the Navy, had to replace those components with similar ones. Thus, during the period in which Crane sold these valves and related parts, the company marketed a material called "Cranite," an asbestos-based sheet material that could be used to produce replacements for the asbestos-containing gaskets and packing originally sold with Crane's valves. In catalogs issued between 1923 and 1962, Crane recommended Cranite gaskets, packing and insulation for use in high-temperature, high-pressure steam services. The catalogs noted that gaskets and packing composed of other materials were available. The catalogs did not indicate the temperature or pressure ratings for some of those alternative products, and it rated others only for low-temperature services, low-pressure services or both. Plaintiff also provided that, during this time, the Navy revised a manual entitled "Naval Machinery." The revised manual specified that Navy employees should install asbestos-based gaskets on the relevant valves on Navy ships. The manual further noted that insulation generally was essential to economical operation of a ship's steam pipe systems, and the manual included diagrams of the attachment of asbestos-based gaskets, packing and insulation to valves of the kind supplied by Crane. In the acknowledgments section, the manual stated that "valuable assistance" in the revision of the manual "was rendered by the manufacturers named herewith. The manual listed Crane among the manufacturers who assisted in the revision.

Accordingly, the plaintiff argues that Crane had "acted negligently in failing to warn Dummitt of the hazards of asbestos exposure for the components used with its valves, and that such negligence was a proximate cause of his injuries."

The Supreme Court of New York granted Plaintiff an accelerated trial preference under CPLR 3403 and consolidated the case with, among others, Matter of New York City Asbestos Litigation (Konstantin v 630 Third Avenue Associates). During the joint jury trial, Crane Co. called Admiral David Putnam Sargent as an expert in Navy procurement practices. Admiral Sargent, who had worked on procurement starting in 1988, testified about Navy specifications for both valves and gaskets. Admiral Sargent testified that, generally, valve manufactures (i.e. Crane Co.), have no role in determining whether, and with what materials, the Navy will choose to insulate the valves after the Navy has received them. When Crane sought to elicit Admiral Sargent's opinion as to whether Navy practices and specifications at the time of Dummitt's exposure to asbestos would have prevented warnings about the perils of asbestos dust released by the valves and sealing parts from reaching Dummitt, plaintiff objected, and the court sustained the objection on the ground that Admiral Sargent's proposed testimony was speculative.

At the conclusion of the trial, Crane moved for a directed verdict, putting forth two main arguments; (1) the plaintiff had failed to present legally sufficient proof that Crane had an applicable duty to warn and (2) because there was no evidence that Crane had acted recklessly in failing to warn the users of its valves about the release of asbestos dust from the combined use of the valves and third-party asbestos-laden sealing components, the court could not instruct the jurors on the potential applicability of the recklessness exception to CPLR 1601's provision for equitable allocation of liability among joint tortfeasors. The court denied Crane's motion for a directed verdict, overruled its objection to the court's proposal to issue a charge on the recklessness exception to the rule of CPLR 1601 and, later, instructed the jurors on that exception.

Following deliberations, the jury found Crane 99 percent liable and awarded $32 million in damages. Crane then moved to set aside the verdict and contended, that under Rastelli v Goodyear Tire & Rubber Co. (79 NY2d 289) and related case law, it had no duty to warn the users of its valves of asbestos-related hazards arising from the use of the valves in conjunction with third-party products containing asbestos. Consequently, Crane argued, the court had erroneously instructed the jurors that it had such a duty, and the evidence was legally insufficient to support the jury's verdict in the absence of any cognizable duty. Crane also renewed its argument that Admiral Sargent should have been allowed to testify that, in his opinion, even if Crane had issued warnings regarding the hazardous release of asbestos dust during the process of replacing the gaskets and packing on its valves, Dummitt would never have received those warnings. Crane also asserted the jury's allocation of liability was against the weight of the evidence and that the damages award was excessive.

The Supreme Court denied Crane's motion except to the extent of setting aside the verdict only to the extent of remitting for a new trial on damages or a stipulated reduction in damages. The parties ultimately stipulated to a reduced damages award of $5.5 million for past pain and suffering and $2.5 million for future pain and suffering, and the court entered judgment accordingly. Crane appealed.

The New York Court of Appeals, in a divided panel, AFFIRMED the judgment in Dummit, holding that (1) although Crane had not manufactured, designed or sold the asbestos-containing products that Dummitt had installed on its valves, Crane had a duty to warn the users of its valves that the use of the valves with third-party asbestos-based products could result in exposure to hazardous asbestos particles; and (2) Crane's specification of asbestos-laden gaskets, packing and insulation, its promotion of the use of such asbestos-based replacement parts via its marketing of Cranite, and its contribution to the "Naval Machinery" manual mandating the use of such asbestos-containing products "'strengthened the connection'" between Crane's products and the other manufacturers' asbestos-laden products. Therefore, the Appellate Division ruled, Crane's "substantial interest" in the installation of asbestos-based products on its valves created a duty to warn of the dangers of that practice. The Appellate Division also declined to reverse the trial court's judgment based on Crane's remaining complaints about the trial court's instructions to the jury, the preclusion of Admiral Sargent's proposed opinion testimony and the jury's verdict.

Matter of Eighth Judicial District Asbestos Litigation (Suttner v. A.W. Chesterton, et al), June 28, 2016

The plaintiff, Joan Suttner, filed suit in the New York Supreme Court, alleging her husband, Gerald Suttner, was diagnosed and passed away from mesothelioma from asbestos exposure as a result of his work as a pipe fitter at General Motors (GM" Tonawanda Engine Plant from 1960 to 1979. The plaintiff alleges this plant had a steam pipe system featuring Crane valves with third-party gaskets and packing materials. The gaskets, packing and surrounding insulation were not manufactured or designed by Crane, and they all contained asbestos. The plaintiff alleges Suttner changed gaskets on Crane valves hundreds of times during his tenure at the plant which included, among other work, cutting new asbestos-containing packing and installing that packing along with a new asbestos-containing gasket.
At trial, the evidence established that Crane sold its valves to GM for use in the high-pressure steam pipe systems in GM's factories. By Crane's own admission, it may have supplied GM with valves accompanied by asbestos-based gaskets and packing. Crane's schematics for the valves even specific the use of asbestos-based packing and gaskets. The plaintiff further noted that Crane offered catalogs in 1936 and 1955 which encouraged customers to install "Cranite" gaskets on its valves, noting that "Cranite gaskets are used on all Crane valves for high-pressure, saturated or superheated steam".

Accordingly, among other assertions, plaintiff put forth a cause of action against Crane Co. for failure to warn of the perils of the combined use of Crane's valves with the asbestos-containing third-party products.
At the end of trial, the court, over Crane's objection, instructed the jurors about the duty of a manufacturer, such as Crane, to warn of the dangers of certain uses of its products. These instructions included concepts of foreseeability, knowledge, and reasonableness. At the end of its deliberations, the jury returned a verdict finding that Crane had rendered its valves defective by failing to warn of the dangers of the joint use of the valves and the other manufacturers' products and that the pertinent defects in the valves were a substantial factor in causing Suttner's injuries and death. The jury apportioned 4 percent of the liability to Crane and awarded a total of $3 million in damages.

Crane moved to set aside the verdict asserting, among other arguments, that the duty to warn arises only if the manufacturer's product, as designed, is physically incapable of working as intended without the other company's product. In Crane's view, as long as the manufacturer's product could still technically work without the other product, it does not matter that the manufacturer's customers cannot afford to maintain the intended operation of the product for any reasonable period of time with any alternative product.

The New York Court of Appeals declined to accept Crane's proposed rule. The court specifically noted that the determination of whether a duty exists turns to a substantial degree on a reasonable and fair allocation of costs and burdens, and Crane's proposed rule with respect to duty would impose an unreasonable monetary cost and an inappropriate burden exclusively on manufacturers' customers. For example, in Crane's scenario, the customer would face an untenable choice between spending unsustainable amounts of money to make the manufacturer's product operate safely and trying to discover the dangers inherent in using the cheaper product with the manufacturer's product and then warning the users of the two products about that danger. In doing so, Crane's rule would either shift the burden of issuing a warning exclusively to consumers or punish consumers who do not incur potentially ruinous financial costs via the installation of the alternative component to prevent a danger that could be more efficiently managed by a low-cost warning from the manufacturer of the primary product. The court noted it would not adopt such an unduly narrow and insensible view of the duty to warn.

In Suttner, the court ultimately denied Crane's appeal and held from the evidence presented, it was readily inferable that Crane intended, affirmatively recommended and could have reasonably foreseen that the users of its valves would install asbestos-containing sealing components on the valves, that Crane learned that its customers were engaging in this practice post sale, and that no non-asbestos products were suitable as a matter of economic or mechanical necessity to allow the valves to function in high-pressure, high-temperature steam pipe systems. As a result of the above, Crane had a duty to warn customers of the perils of the combined use of Crane's valves.
The New York Court of Appeals, in regards to both Dummit and Suttner, held the lower courts properly determined that Crane had a duty to warn the reasonably foreseeable users of its valves that the synergistic use of the valves and third-party asbestos-containing products could expose them to carcinogenic asbestos dust, and the evidence was legally sufficient to support the jury's finding of Crane's liability in each case.

Read the full decision here.

Highest Court of New York Refuses to Consider Defendant's Argument That Joint Trial was Improper Because Defendant Failed to Preserve Issue for Appeal

(New York Court of Appeals, June 28, 2016)

In the 1970s, the plaintiff's decedent, Dave John Konstantin, worked as a carpenter at two Manhattan construction sites where defendant Tishman Liquidating Corporation (TLC) was the general contractor. The decedent died of mesothelioma in 2012. This case was assigned with nine other cases to an in extremis trial calendar; all 10 plaintiffs were represented by the same firm and requested a joint trial, which the defendants opposed. Seven of the 10 cases (all with mesothelioma) were ordered to be tried together, and the remaining three (all with lung cancer) would be tried together. Before trial, five of the seven mesothelioma cases settled, leaving only this case and Dummitt v. A.W. Chesterton to be tried together. The jury found TLC 76 percent liable for the decedent's injuries. The Supreme Court denied TLC's post-trial motion to set aside the verdict and held that the joint trial was not improper, but reduced the jury's damages award. TLC appealed, arguing, among other things, that the Supreme Court abused its discretion in holding a joint trial.

The Appellate Division considered Konstantin and Dummitt appeals together, and found that the Supreme Court did not err in holding a joint trial; two Justices dissented in Dummitt but concurred in the result in Konstantin, because the court should have declined to address TLC's challenge to the Supreme Court's pretrial order granting a joint trial on the ground that TLC failed to assemble a proper appellate record. On appeal before this court, TLC again contended that the two actions were improperly tried together. The court agreed with the Appellate Division justices who dissented in part that TLC's failure to assemble a proper record prevented the court from reviewing the Supreme Court's pretrial order.

TLC failed to preserve this challenge for appellate review. TLC did not specifically challenge the joint trial until its post-trial motion, which was insufficient to preserve its contention for appellate review. Although TLC argued it was unnecessary to renew its objection after the five other cases settled because it joined all defendants in opposing the plaintiffs' pretrial motion, the court disagreed. If, after the five cases settled, TLC believed the Supreme Court should

consider the propriety of a joint trial anew, it was incumbent upon TLC to object and raise specific arguments it did not assert until the post-trial motion. TLC did not do so.

Read the full decision here.

Applying Factors Outlined by the Second Circuit, New York Court Refuses to Consolidate Three Asbestos Cases for Trial

(Supreme Court of New York, New York County, May 17, 2016)

The plaintiffs moved to consolidate three cases for trial. Defendants American Biltrite and Kaiser Gypsum opposed. The court denied the plaintiffs' motion to consolidate.

Courts consider six factors outlined by the Second Circuit in determining whether or not to consolidate individual plaintiffs' cases for a joint trial where asbestos exposure is alleged: "(1) whether the plaintiffs worked at a common or similar worksite; (2) whether the plaintiffs had similar occupations, as a 'worker's exposure to asbestos must depend mainly on his occupation,' such as those who worked directly with materials containing asbestos as opposed to those who were exposed to asbestos as bystanders; (3) whether the plaintiffs were exposed to asbestos during the same period of time; (4) whether the plaintiffs suffer or suffered from the same disease, as the jury at a consolidated trial will hear evidence about the etiology and pathology of different diseases, and prejudice may result where the jury learns that a terminal cancer engenders greater suffering and shorter life span than does asbestosis; (5) whether the plaintiffs are alive; 'dead plaintiffs may present the jury with a powerful demonstration of the fate that awaits those claimants who are still living'; and (6) the number of defendants named in each case."

The plaintiffs argued consolidating these cases would save time, all the plaintiffs died from mesothelioma, and all exposure occurred in the 1960s-1970s. In one case, sixteen defendants remained; in another case, Kaiser Gypsum was the only remaining defendant, and in the third case, American Biltrite was the only defendant remaining. The court noted that while judicial economy should be considered, the paramount concern was for a fair and impartial trial. State of the art evidence may differ according to occupation, industry, and/or product, and selecting a jury for a multi-plaintiff trial was more difficult. Here, 20 of the 24 defendants would be participating in a trial in which they were parties in only one of three cases; this would extend the trial and require the jury to sift through voluminous information to differentiate between claims and defenses. After analyzing all six factors, the court denied the motion to consolidate.

Read the full decision here.

Plaintiff's Motion to Consolidate Numerous NYCAL Cases into Six Trial Groups Granted

(Supreme Court of New York, New York County, March 21, 2016)

The plaintiff moved to consolidate numerous cases into six trial groups pursuant to CPLR 602(a) on the grounds that there are common issues of law and fact. Several defendants opposed the consolidation, arguing, among other things, that they are prejudiced by joint trials, which violate their due process and equal protection rights. They also argued that the plaintiffs consistently recover more in joint trials as juries are confused in joint trials and rely on testimony in one action to bolster their determination in another action and they are deprived the right to cross-examine the witnesses in the case where they are not a party, but the jury will still use that testimony against them.

In granting the plaintiff's motion to consolidate, the court reviewed the "Malcom Factors" — (1) common worksite; (2) similar occupation; (3) similar time of exposure; (4) type of disease; (5) whether plaintiffs were living or deceased; (6) status of discovery in each case; (7) whether all plaintiffs were represented by the same counsel; and (8) type of cancer alleged" (*Malcolm v National Gypsum Co*., 995 F2d 346, 350-351 [2d Cir 1993])."

As the court held: "One flaw in defendants' argument is their position that consolidation is only meant for litigants 'in nearly identical matters.' Pursuant to CPLR section 602 (a), '[w]hen actions involving a common question of law or fact are pending before a court, the court, upon motion, may order a joint trial of any or all the matters in issue, may order the actions consolidated, and may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.' Trial courts have the authority to consolidate asbestos cases pursuant to CPLR 602 (a) where they involve common questions of law and fact (Matter of New York City Asbestos Litig. (Dummitt) 121

AD3d 230 [1st Dept 2014]). Moreover, 'there is a preference for consolidation in the interest of judicial economy and ease of decision-making where there are common questions of law and fact, unless the party opposing the motion demonstrates that consolidation will prejudice a substantial right' (Matter of Progressive Ins. Co. (Vasquez-Countrywide Ins. Co.), 10 AD3d 518 [1st Dept 2004]). While defendants assert that their substantial rights are prejudiced by joinder in asbestos cases, they have not demonstrated that such prejudice will occur in the proposed two-plaintiff trials proposed herein."

Read the full decision here.

Plaintiffs' Motion for Joint Trial Denied Since Individual Issues Between Plaintiffs Predominated Over Any Common Questions of Law and Fact

(Supreme Court of New York, New York County, March 10, 2016)

The plaintiffs, who had the same attorneys, commenced personal injuries actions in Nassau County Supreme Court, alleging personal injuries as a result of exposures to asbestos. In support of the motion, it was noted that each plaintiff was still alive and suffering from lung cancer, were exposed to the same or similar materials during a similar time frame, that common defendants existed, and that the non-parties would overlap. The defendants opposed on several grounds, including that the distinctions between the individual plaintiffs made joinder inappropriate and that the plaintiffs were exposed to separate asbestos containing products such that the respective descriptions of the products worked with would differ, and thus, could lead to jury confusion.

After considering the consolidation factors for asbestos cases announced in *Malcolm v. National Gypsum Co.*, 995 F.2d 346 (2d Cir. 1993) "(1) common worksite; (2) similar occupation; (3) similar time of exposure; (4) type of disease; (5) whether plaintiffs are living or deceased; (6) status of discovery in each case; (7) whether all plaintiffs were represented by same counsel; and (8) type of cancer alleged"), the court found that "the individual issues between [the plaintiffs] predominate o[ver] any commons questions of law and fact." The plaintiffs' application for a joint trial was accordingly denied.

Read the full decision here.

NYCAL Court Permits Discovery of Non-Party Co-Author of Article Analyzing Verdicts in Association with Consolidated Trials

(Supreme Court of New York, New York County, January 12, 2016)

In this NYCAL case, Justice Peter Moulton denied the defendants' motion seeking to quash a subpoena served by Weitz & Luxenberg P.C. upon Mr. Marc Scarcella of Bates, White LLC, an economic consulting firm. Mr. Scarcella co-authored an article entitled, "The Consolidation Effect: New York City Asbestos Verdicts, Due Process and Judicial Economy." In summary, the article analyzed verdicts in association with consolidated trials in NYCAL.

In denying the motion to quash, the court began its opinion by noting that the Defendants "concede[d] that [the witness] has from time to time served as an expert witness in NYCAL, but not as an expert in connection with the article" and that the article "has been invoked by defendants in NYCAL in opposition to consolidation motions." *See Opinion* at p. 1. The court determined that the defendants "failed to carry [their] burden" to show that the discovery would be futile "of the process to uncover anything legitimate." *Id,* at p. 3. In denying the motion, the court mainly pointed to the defendants' repeated invocation of the article in opposition to motions for consolidated trials and with respect to improvements to the CMO. The court further rejected various procedural defects associated with the subpoena and directed that the deposition "commence on or before February 11, 2016." *Id.,* at 5.

Read the full decision here.

Damages Decisions

Court Upholds Verdict in FELA Matter in Face of Limitations Argument But Vacates Damages Award and Remands

(Appellate Court of Illinois, Fourth District, October 18, 2016)

In this negligence actions brought under the Federal Employers' Liability Act (FELA), the Appellate Court of Illinois, Fourth District, affirmed the jury's verdict against defendant Illinois Central Railroad Company (Central) but vacated the award of damages and remanded for a new damages hearing. In 2003, Paul McGowan was diagnosed with lung cancer and died. In December 2008, his estate filed a 13-count complaint seeking damages from various defendants as a result of Mr. McGowan's lung cancer and death. Count IV of the complaint was for damages under the FELA (45 U.S.C.A. §§ 51-60), alleging that Mr. McGowan had worked for Central, where he was exposed to asbestos as a result of Central's negligence, which caused his lung cancer and resulting death.

In February 2015, a jury trial began on the FELA count against Central. Prior to trial, Central moved to dismiss arguing that the claims were brought outside the three year statute of limitations period provided by section 56 of FELA. The trial court denied that motion. At trial, after the close of the plaintiffs' evidence, Central moved for directed verdict under section 2-1202 of the Illinois Code of Civil Procedure again arguing that the claim was barred by the statute of limitations. The motion was denied because the court concluded the jury should determine factual issues that control when the statute of limitations began to run. After presenting its case, Central again moved for directed verdict on the issue and the court again denied. The trial court held a jury instruction conference on issues of the statute of limitations and damages. The court denied the instructions tendered by Central on those issues and, instead, granted and gave the instructions tendered by the plaintiffs. Also, the court sent the jury a special interrogatory: "Was the complaint filed within three years from the date on which the estate's administrator knew, or reasonably should have known both a death occurred and that the death was wrongfully caused?" The jury answered the interrogatory in the affirmative and returned a verdict for the plaintiffs and against Central. The jury awarded the plaintiffs $3,452,500 in damages, $2,055,833 of which was awarded for pecuniary losses suffered by Mr. McGowan's family as a result of his death. The jury found further that Mr. McGowan was contributorily negligent in the amount of 10 percent, which reduced the award to $3,107,250. The trial court later entered judgment on the jury's verdict. In April 2015, Central filed a motion for judgment notwithstanding the verdict. In September 2015, after conducting hearings, the trial court denied the motion, except as to the issue of a setoff and, accordingly, the court reduced the damages award to $2,940,583.

Central appealed on two main issues, the statute of limitations and damages. Central's arguments regarding the statute of limitations fell into two main arguments: 1) issues of law concerning the content of the special interrogatory and the jury instructions; and 2) issues of fact concerning whether the jury's interrogatory finding that the plaintiffs' claim complied with the statute of limitations was against the manifest weight of the evidence. The court rejected these arguments. First, as to the special interrogatory, Central argued that the special interrogatory did not accurately describe the statute of limitations. The court disagreed saying the interrogatory properly described the law, and moreover, the argument failed because Central itself tendered the interrogatory in the trial court and under the invited error rule a party cannot complain of error that it brought about or participated in. Next, as to whether the jury's "yes" finding was against the manifest weight of the evidence, the court explained that Mr. McGowan was diagnosed with lung cancer and died in December 2003 and that he had no duty to investigate the cause of his cancer while on his death bed. Further, testimony established that Mr. McGowan's family did not know that he worked around asbestos until 2008, and the complaint was filed later that year. Therefore, the jury's finding that the claim was filed "within three years from the date on which the estate's administrator knew, or reasonably should have known that death was wrongfully caused" was not unreasonable or arbitrary and was based on the evidence. The court also rejected Central's arguments concerning the jury instructions for failing to object accordingly at trial, thereby forfeiting the argument.

As to damages, Central argued that the court abused its discretion by instructing the jury that, should the jury find for the plaintiffs on the issue of liability, the jury must award damages for the pecuniary loss to the following people: The plaintiffs spouse, living children, and grandchildren whose parents (Mr. McGowan's daughters had died by the time of trial. As a result, Central argued that the jury's original award of $2,055,833 in pecuniary damages (before the court reduced it for contributory negligence and setoff) was erroneously inflated and must be vacated. The court agreed, holding that in this case no evidence was presented to show that Mr. McGowan's children or grandchildren suffered any pecuniary loss as a result of his death. Because FELA provides for pecuniary damages only, none of Mr. McGowan's children or grandchildren were entitled to recover. As a result, the trial court's decision granting the plaintiff's instruction No. 18 (describing what damages may be considered) was an abuse of discretion because it clearly misled the jury and resulted in prejudice to Central. As a result, the court vacated the jury's award of

$2,055,833 in pecuniary damages and remanded for a new damages hearing to determine the proper amount of pecuniary damages that should be awarded.

Read the full decision here.

Breakdown of $21 Million Verdict in Miami, Florida

(Circuit Court of 11th Judicial Circuit for Miami-Date County, Florida, August 30, 2016)

On August 30, 2016, a Miami, Florida jury awarded nearly $21.4 million in damages to Richard Batchelor and his wife, Regina, in a case where the plaintiffs alleged that Bechtel Corporation caused his mesothelioma. The case proceeded only against the defendants Bechtel Corporation and Foster Wheeler Energy Corporation, as Foster Wheeler settled the day before the verdict. The verdict sheet demonstrates that, after the jury found that negligence on the part of Bechtel was a legal cause of the plaintiff's damages, the jury turned to allocation of fault. The jury was asked to state the percentage of fault, which was a legal cause of damage to the plaintiff. The jury assigned 60 percent of fault to Bechtel, 35 percent to Florida Power & Light Company, and 5 percent to Foster Wheeler Energy Corporation.

As to damages, the jury found that the plaintiff sustained damages in the amount of $381,724.12 in medical expenses. The jury found total non-economic damages for Mr. Batchelor of $15,000,000. That figure included $3,000,000 in past and $12,000,000 in future damages. The jury also awarded Regina Batchelor loss of consortium damages totaling $6,000,000. These damages were broken down into $1,000,000 in past damages and $5,000,000 for future damages.

Read the verdict sheet here.

Court Issues Significant Verdict Reduction Based in Part on Jury Error of Finding Intentional Misrepresentation and Fraudulent Concealment

(Superior Court of California, Los Angeles County, July 18, 2016)

In a case previously reported on in ACT, a California jury found for the plaintiffs, Louis Tyler and Elizabeth Tyler and against defendant American Optical Corporation (AOC), the lone defendant remaining at trial, with an award of $22.8 million. This award consisted of $1.8 million in economic damages (medical expenses, lost income, household services, etc.) and $21 million in non-economic damages. The jury also found that AOC acted with malice, oppression and fraud, and awarded $10 million in punitive damages. The overall verdict totaled $32.8 million. The jury made several findings as to liability. Although AOC was 70 percent liable for the plaintiffs' losses, it assessed responsibility to other actors as well. The jury found that 3M Company (maker of a mask that Mr. Tyler used for three years) was 5 percent liable; Foundry Service (Mr. Tyler's employer during the years of alleged exposure) was 20 percent liable; and Mr. Tyler was himself 5 percent responsible. Under California Law, Proposition 51, Cal. Civ. Code Sec. 1431.2, a negligent tortfeasor is only responsible for its liability share of the total verdict. However, because the jury had found that AOC had committed the intentional torts of fraud and concealment, the court did not reduce the amount of non-economic damages to AOC's liability share as Proposition 51 does not apply in favor of an intentional tortfeasor as against the plaintiffs or negligent tortfeasors [Citation Omitted].

Post-verdict, AOC moved for judgment notwithstanding the verdict on all claims including excessive damages and claims of intentional misrepresentation and fraudulent concealment.

On July 18, 2016, the Superior Court of California, Los Angeles County, granted AOC's motion for judgment notwithstanding the verdict with respect to claims for intentional misrepresentation and fraudulent concealment. The motions for judgment notwithstanding the verdict as to all other causes of action were denied. The court supported this holding as follows.

The court agreed with AOC's arguments that the jury erred with respect to claims of intentional misrepresentation and fraudulent concealment against AOC. The jury was instructed in this case that a plaintiff seeking to prove fraud bears a heavy burden, and must establish, among other elements, the intent to defraud and justifiable reliance of the same. Going against the jury's determination, the court ultimately found that the circumstantial evidence in this case "may be sufficient to support a failure to adequately warn a foreseeable misuse, but there is no substantial evidence that AOC intentionally sought to defraud consumers, or that Mr. Tyler acted as the result of such fraud." The court's ruling required the reduction of the verdict to reflect the proportion of responsibility for non-economic damages as assigned

by the jury (AOC is ordered to file a proposed judgment making these reductions within ten court days. The plaintiffs will have ten court days to object to such a judgment). The court's reduction would essentially reduce the non-economic damages from $21 million to approximately $14.7 million. The economic damages of $1.8 million would go not be reduced. If accepted, the reduced total for compensatory damages would be $16.5 million.

AOC also moved for a new trial or remittitur based on (1) irregularity in proceedings; (2) jury misconduct; (3) excessive damages; (4) insufficient evidence; and (5) legal errors. Upon review, the court found the compensatory damages of $22.8 million was not out of proportion to the evidence of the losses suffered by the plaintiffs. It was noted that while this award appeared high in relation to other personal injury awards in that same judicial district, a court's own opinion of whether a particular verdict is high or low for a given injury is highly subjective, and anecdotal. The California Court of Appeals has cautioned courts against giving too much weight to this type of comparison and advised "for a reviewing court to upset a jury's factual determination on the basis of what other juries awarded to other the plaintiffs for other injuries in other cases based up different evidence would constitute a serious invasion into the realm of fact finding." This judge further noted he has the experience of one lifetime, not twelve, and is not inclined to second-guess the jury on this question. Thus, the court found the amount awarded for compensatory damages was not disproportionate to the damages suffered.

With respect to the jury's award of $10 million for punitive damages, the court found that it was excessive and not reasonably related to the purposes for imposing punitive damages. When considering whether a given award is excessive when measured against the purposes of punitive damages, routs often consider the percentage of net worth represented by the award, allowing awards up to 10 percent of the defendant's net worth. California courts have routinely upheld punitive damage awards which amounted to a percentage of net worth from .005 percent to 5 percent, and not exceeding 10 percent. [Citation Omitted]. In this matter, AOC has essentially gone out of business. AOC has no operations, does not make or sell products and has no income from patents or licenses, and has a negative net worth of $9.6 million. It continues to exist largely as an administrative convenience to the insurance companies that are paying the claims. AOC's only substantial asset was $1 million in cash in its accounts (details of which were never explained to the jury). However, at trial, the court allowed the plaintiff's expert to testify that the evidence indicated that AOC paid its obligations when they came due because that is the recognized indication of solvency. It was also elicited that AOC paid its liabilities through insurance. Due to this fact, the jury believed AOC could pay the punitive damage award of $10 million. Through various calculations, the court ruled that the jury could have found that $1.5 million constituted AOC's available "wealth" despite the negative net worth previously stated. Ten percent of this "wealth" amount is $150,000.

Based on the above, the court issued an order conditionally granting the motion for a new trial on the issue of punitive damages and the new trial will be granted unless the plaintiffs (within 30 days of service of the order), file their consent to a reduction in the amount of punitive damages in the amount of $9,850,000. This reduced the punitive damages from $10 million to $150,000.

Read the full decision here.

California Appellate Court Affirms All of Trial Court's Rulings in Extensive Damages Case Against Kaiser Gypsum

(Court of Appeal of California, January 21, 2016)

The plaintiffs in the case were a married couple who filed a claim for personal injury due to bystander asbestos exposure after the husband was diagnosed with mesothelioma. After a lengthy trial against defendant Kaiser Gypsum, the plaintiffs were awarded $21 million in compensatory damages but the jury could not reach a verdict regarding punitive damages. A retrial was ordered on this issue, and the second jury awarded $20 million in punitive damages, which the court reduced to just under $4 million. Defendant Kaiser Gypsum appealed, arguing various evidentiary and instructional errors and other issues. The plaintiffs challenged the court's reduction of punitives. The appellate court, in an extensive summary of the first and second trials, and with extensive analysis of each point of appeal, affirmed all the trial court's rulings.

The plaintiff husband worked as a plumber and pipefitter at numerous construction sites; the evidence showed that he worked with and around various asbestos products and was around when workers used joint compound. At the time of his exposure, the asbestos content of Kaiser Gypsum's joint compound ranged from 1.5-6 percent. A co-worker testified that Kaiser made 70-80 percent of the drywall at their job sites. The defense experts testified that exposure levels such as those of the plaintiff would be much lower than those of actual users, and that until the 1970s it was believed that asbestos was not harmful unless large-dose exposures were sustained. The plaintiffs presented evidence that the risks of asbestos were well known by 1965.

The court addressed the following arguments on appeal: (1) the trial court did not abuse its discretion in excluding Kaiser's construction sequencing expert because this expert did not possess relevant experience; (2) as shown by California case law, the partial retrial on punitive damages with a separate jury did not violate California civil rules; (3) Kaiser failed to show prejudice with the court's refusal to inform the second jury that the first jury awarded the plaintiffs $21 million in compensatory and Kaiser's liability was 3.5 percent; (4) the fact that the second jury heard evidence that Kaiser sold asbestos through 1978, and the first jury heard it sold asbestos through 1975, could not have affected the outcome of the trial because there was extensive evidence of Kaiser's conduct since 1965; (5) the fact that the second jury had no way of knowing what conduct the first jury found tortious, because the plaintiffs asserted three different theories of liability, is irrelevant because this argument was speculative and it improperly mixes the issues of liability and damages – an issue that Kaiser sought to keep separate; (6) the court did not abuse its discretion in excluding evidence of the plaintiff's other exposures to asbestos, because the salient inquiry was whether Kaiser acted with malice. The court stated: "In sum, we conclude that the partial retrial limited to the issue of malice and the amount of punitive damages was not prejudicially unfair to Kaiser Gypsum."

The court also addressed the issues of allocating pre-verdict settlement proceeds, and found the trial court did not abuse its discretion in allocating the amount of settlement credits the way it did. Further, the court found there was sufficient evidence of malice or oppression, and the trial court did not err in modifying the jury instruction regarding punitive damages. Finally, the trial court's decision to reduce the punitive damages award was not an abuse of discretion.

Read the full decision here.

Discovery Decisions

Special Master Recommendation Upheld Denying Plaintiff's Discovery Requests

(Supreme Court of New York, New York County, October 27, 2016)

Plaintiff Lori LoGiudice developed mesothelioma and brought suit, alleging her disease was caused by her use of asbestos-containing Cashmere Bouquet talcum powder made by Colgate-Palmolive. The only other defendants were suppliers of asbestos-containing talc to Colgate. After the Special Master denied certain discovery requests made by the plaintiff, the plaintiff moved for relief. The court affirmed the recommendations made by the Special Master. At issue was one request for production involving conversations between Dr. Marie Capdevielle and individuals interviewed by her in preparation for her role as corporate representative (RFP 11), and 54 requests to admit. Colgate argued the requests to admit improperly sought discovery which should have been sought through other means, and were improper in that they fished for information.

New York law mandated that request for admission should concern "the authenticity of documents, the correctness of pictures, and 'the truth of factual matters the requesting party 'reasonably believes there can be no factual dispute.'" As such, the court affirmed the Special Master's recommendation of RFP 11. Similarly, the court also affirmed the recommendation denying the requests to admit. The plaintiff failed to demonstrate that these requests were narrowly tailored to eliminate from litigation factual matters that would not be in dispute at trial. The plaintiff's requests, in many instances, sought to "learn Colgate's contentions by offering a series of competing answers on the same issue."

Read the full decision here.

Sanctions Granted Against Defendant for Suspension of Corporate Representative Deposition

U.S. District Court for the Central District of California, October 24, 2016

The plaintiffs' brought this action against Electric Boat and General Dynamics for their decedent's alleged development of mesothelioma as a result of his work as a machinist at the defendants' shipyards.

The plaintiffs sought depositions of the corporate representatives of both Electric Boat and General Dynamics since Electric Boat operated as a division of General Dynamics during the alleged exposure period. The plaintiffs noticed

the deposition of General Dynamics' corporate representative. General Dynamics objected to the notice and a hearing was promptly held. The court ordered that the deposition shall take place within 30 days of the court's order. The parties then agreed to a date for the corporate representative deposition. Of note, General Dynamics confirmed in a letter to the plaintiff and in "subsequent representations to the Court" that Mr. Bradford Heil was being offered as a corporate representative for both General Dynamics and Electric Boat. At the deposition, counsel for the plaintiffs bifurcated questions as to the two defendants. Counsel for the defendant objected to the question of whether Heil understood that he had been designated and identified as General Dynamics Corporation's person most qualified under Rule 30(b)(6). Counsel for General Dynamics would not agree to a separate deposition of General Dynamics and that Heil was testifying as a representative of Electric Boat, a former Division of General Dynamics and Electric Boat Corporation. The plaintiff suspended the deposition.

The plaintiffs moved for terminating sanctions. General Dynamics took the position that the issue was an "error" and "misunderstanding" over wording. General Dynamics offered to make the deposition of Heil binding on General Dynamics and to make him available for a new deposition after the hearing on the terminating motion.
The court noted that sanctions are authorized when a party fails to appear at a properly noticed deposition. General Dynamics argued that sanctions are unwarranted because the court had previously denied sanctions in an earlier similar motion. The plaintiffs should not be allowed to litigate that issue again according to General Dynamics. Further, it had offered Heil for a second deposition. The court disagreed and stated that sanctions were warranted. Here, the court noted that the order denying the similar previous motion was issued based on the understanding that the defendant would offer Heil for deposition as General Dynamics' corporate representative.

The real question for the court was not whether sanctions were merited but rather to what extent. Terminating sanctions were denied as the standard set in *In re Exxon Valdez* was for extreme circumstances only. However, Rule 37(b)(2)(c) authorized the court to pay reasonable expenses. General Dynamics argued that an award of expenses was not warranted because it had not violated any Order. The court quickly dispensed of this argument by pointing out that General Dynamics had been ordered to produce a corporate representative on February 27, 2015 notwithstanding the prior protective orders.

In sum, the court ordered General Dynamics to make Heil or another corporate representative available for deposition and to pay expenses in the amount of $14,500 within 14 days.

Read the full decision here.

Collateral Estoppel Did Not Bar Petition to Perpetuate Testimony in Federal Court Prior to Filing Suit Due to Key Distinctions Between Federal and Texas Rules of Civil Procedure

(U.S. District Court for the Southern District of Texas, September 30, 2016)

The petitioner filed suit against various entities after developing mesothelioma, alleging asbestos exposure while working for Square D in Cedar Rapids, Iowa from 1971-76. Due to her extremely bad and rapidly deteriorating health, the petitioner sought a court order authorizing her oral and videotaped deposition for use in her anticipated lawsuit for either personal injury or wrongful death. The court granted her request to perpetuate testimony.

The court analyzed Federal Rule of Civil Procedure 27(a), which establishes the procedure for obtaining a pre-suit deposition to perpetuate testimony. The court also examined Fifth Circuit law outlining elements to consider when determining whether such a deposition was proper. Based upon the filings, presentations, and stipulations at the court hearing, the court found that the petitioner adequately satisfied the rule's requirements.

The court also analyzed whether collateral estoppel applied to bar suit against four of the defendants in this case, due to previous dismissals for lack of personal jurisdiction in similar petitions in Texas state court. Collateral estoppel is a complete bar to later actions when the factual issues that are precluded from re-litigation are determinative of the matter in controversy in later suits. Here, collateral estoppel did not bar this proceeding due to key distinctions between Federal Rule 27 (a) and its Texas counterpart, Rule 202. Since this was a federal case, federal procedural rules applied, and Federal Rule 27 had very liberal jurisdictional provisions tor a proceeding to perpetuate testimony — allowing same where any expected adverse party resided. "The purpose of Rule 27(a)(1) is solely to permit the petitioner to preserve testimony or evidence that might be lost, concealed or destroyed before suit is filed, but, unlike its Texas counterpart, it is not for use to uncover facts that might support the future suit … this Court … may grant an order to take a deposition 'if it is satisfied that a failure or a delay of justice may thereby be prevented.'"

Although General Electric argued that a Rule 27(a) petitioner must show they were presently unable to file a lawsuit because there was some obstacle beyond their control which prevented them from doing so, Rule 27 was available in special circumstances to preserve testimony which would otherwise be lost. It may not, however, be used to obtain facts necessary to draft a complaint. Substantial authority supported the petitioner's claim that serious illness may constitute a significant risk that a witness's testimony may be lost if not taken before suit can be filed.

Read the full decision here.

Argument That Plaintiff's Counsel Misrepresented Return of Privileged Memo Unavailing; Defendant's Own Actions Waived Privilege

(Supreme Court of New York, July 14, 2016)

Defendant J-M Manufacturing Company, Inc. moved to vacate the Recommendation of the Special Master finding that J-M waived privilege. In so doing, the defendant argued the Special Master erroneously applied New York law instead of California law in determining that the defendant waived the attorney-client privilege attached to the redacted and unredacted versions of a 1983 memo from the defendant's in-house counsel to its president. The plaintiff opposed the motion.

In its motion to vacate, J-M argued the memo was first inadvertently produced in a very large document production, and that plaintiff's counsel misrepresented that they returned all copies and had not disseminated it, because a redacted version of the memo appeared 10 years later in a California case. J-M also argued the Master mistakenly applied New York law because the Master incorrectly found the issue was procedural, and that even if New York law applied, the privilege was not waived.

It was undisputed that the memo was privileged. However, since this memo was addressed in depositions, affidavits, and proceedings in courts of numerous states, the issue became whether this privilege was inadvertently waived. In answering this question the Special Master reviewed the history of the memo's use during litigation of various matters. The Master found that much of J-M's success in obtaining protective orders was based on nebulous and hearsay accusations of alleged misconduct by some or all of plaintiff's counsel when, in reality, no one really knew anything about what really happened with respect to the memo. The Master found that J-M's own actions contributed in great part to diluting the privilege, and that J-M's assertion of privilege over the memo was incompatible with its numerous disclosures and testimony regarding the statements contained within. As such, the privilege was waived with respect to both versions.

In arguing that this issue was substantive, not procedural, J-M cited article commentary that privilege issues maintained an aura of substance, and cited to lower New York court cases holding that attorney-client privilege was substantive in nature. While New York was the site of the tort in this case, California had the strongest interest in its privilege law being applied to the document (because 12 previous California cases found the document privileged). Further, even if New York law applied, The Master confused compelled disclosures with voluntary disclosures, as compelled disclosures due to court order could not be deemed waivers. The Master also erred in interpreting isolated quotes from J-M's previous counsel, who was misled by plaintiff's counsel.

The plaintiff argued certain portions of the memo were not privileged because it contained business, not legal, advice. The plaintiff also cited to several cases holding that evidence was a procedural issue. Even under California law, J-M waived the privilege.

The court's opinion contained the facts cited by plaintiff to support the Master's finding of waiver and found as follows. First, the Master correctly applied New York law. New York, not California, had the greatest interest in applying its law because it was the site of the alleged asbestos exposure. Under New York law, a privilege is waived when a document is produced, unless: the proponent of privilege demonstrates that the client intended to maintain confidentiality; reasonable steps were taken to prevent disclosure; the party asserting privilege acted promptly after discovering disclosure; and the parties who received the document would not suffer undue prejudice if a protective order against the use of the document was issued. Other considerations included: whether a party promptly objects; voluntary testimony by a client to a privileged matter.

The court found that under New York law, J-M waived the privilege. The Court stated: "I agree with the Special Master that defendant's attempt to blame opposing counsel for alleged misrepresentations is untenable. I cannot conclude as a matter of law that these misrepresentations (which are disputed by plaintiff's counsel) ever took place. Even assuming such misrepresentations were made, and while the best defense is sometimes an offense, defense counsel cannot abdicate their responsibility to represent their clients by deferring to statements made by opposing

counsel, regardless of any ethical obligations imposed on the latter. Defense counsel's job is to protect their clients, rather than seek protection for themselves from the action of opposing counsel …The facts cited by the Special Master easily support a finding of waiver under New York law regarding the redacted Memo."

Read the full decision here.

Meeting Agendas Between Non-Party Consultant and Counsel for Asbestos Friction Clients Not Privileged

(Appellate Court of Illinois, Fifth District, June 30, 2016)

The plaintiffs' law firm of Maune Raichle Hartley French & Mudd, LLC (Maune) subpoenaed documents from Exponent, Inc., a non-party in Maune's asbestos litigation pending in Madison County, Illinois. At the request of Exponent, the circuit court held Exponent in friendly civil contempt for refusing to provide an unredacted version of certain documents requested in Maune's subpoena. Exponent appealed this contempt order as well as the underlying discovery order. Exponent argued that the circuit court abused its discretion in requiring production of these documents, because they were not relevant and were protected by attorney work product and consultant work product privilege. The court vacated the contempt order and monetary sanction, and affirmed the underlying discovery order.

Exponent is a science and engineering consulting firm that conducts various studies regarding the effects of asbestos exposure. Some of its research is funded by companies regularly sued for asbestos exposure by the Maune firm, such as Ford. Ford has listed Exponent scientists as experts. This appeal involved redacted documents consisting of agendas from meetings held between Exponent and counsel for Exponent's clients — Ford, Chrysler, and General Motors. After lengthy discovery procedures, including an in camera review and a motion to reconsider, the circuit court ordered Exponent to produce the unredacted version of these documents.

Regarding relevance, Maune argued these documents were relevant because Ford routinely used Exponent's friction studies to argue that the "independent" studies indicated that friction products could not cause asbestos-related disease. Maune argued these studies were not "independent" and the documents at issue evidenced backroom discussions and a financial and business relationship between Ford, Chrysler, General Motors, and Exponent. Exponent argued the documents were not relevant to establish the bias of testifying experts, and their experts relied on the studies, not the documents at issue. The court found that the court did not abuse its discretion in concluding the documents were relevant and discoverable. The documents related to the studies and scientific defense that Ford used at trial.

Regarding privilege, Exponent failed to meet its burden to show that the documents revealed the mental process by which attorneys serving Exponent's clients assembled information to use in litigation. The documents were not prepared by an attorney, but by Exponent scientists, and there was no indication that Ford created these agendas. Further, Exponent failed to show it was an agent of Ford's attorneys, and the documents did not reflect or disclose the mental impressions of counsel. Since the documents were not work product, the documents were likewise not entitled to the protection of the consultant work-product doctrine. However, since Exponent was acting in good faith, the contempt order and $1 monetary sanction was vacated.

Read the full decision here.

Southern District of Illinois Strikes Portions of Pre-Trial Disclosures Containing Vague, Boilerplate Language; Parties Have No Right to Reserve Use of Un-Named Discovery

(U.S. District Court for the Southern District of Illinois, February 12, 2016)

In four different rulings in the same case, the Southern District of Illinois struck portions of pre-trial disclosures filed by the plaintiff and various defendants. In their pre-trial disclosures, defendants Ingersoll-Rand, Viking Pumps, and Excelsior identified no witnesses and reserved the right to call numerous un-named witnesses at trial. The plaintiff also reserved the right to call numerous un-named witnesses at trial.

The court cited Rule 26: "Under Rule 26(a)(3), pretrial disclosures must (emphasis added) include: '(i) the name and, if not previously provided, the address and telephone number of each witness…(ii) the designation of those witnesses

whose testimony the party expects to present by deposition…and (iii) an identification of each document or other exhibit, including summaries of other evidence — separately identifying those items the party expects to offer…' Fed. R. Civ. P. 26(a)(3)(A)." If a party fails to provide information as required by Rule 26, that party was not allowed to use this information unless the failure was substantially justified or harmless. This sanction of exclusion was mandated by Rule 37(c). The court found: "The vague and boilerplate identification of categories of potential witnesses is insufficient and inconsistent with the spirit and purpose of Rule 26." Further, this failure to comply was neither substantially justified nor harmless.

Parties could not reserve rights they did not have under Rule 26. The plaintiff, Ingersoll-Rand, Viking Pumps, and Excelsior were prohibited from presenting any witnesses live or by deposition testimony at trial that were not in compliance with Rule 26. Further, the court struck portions of the exhibit lists filed Ingersoll-Rand, Viking Pumps, and Excelsior for failure to comply with Rule 26.

Read the first ruling here. | Read the second ruling here. | Read the third ruling here. | Read the fourth ruling here.

Expert Challenges Decisions

Mixed Decision on Defendants' Motion in Limine to Preclude Dr. James Millette

(U.S. District Court for the Eastern District of Louisiana, October 11, 2016)

The defendants (pump and valve manufactures) filed a motion in limine to exclude certain studies and videos produced by the plaintiff's expert Dr. James Millette. The defendants challenged two aspects of Dr. Millette's proposed testimony. First, they argued that some — but not all — of the academic studies that Dr. Millette relied on are not reliable and do not fit the facts of the case, and thus should be precluded from discussing them at trial. Second, the defendants argued that Dr. Millette should not be able to display any videos he created that rely on the "Tyndall Lighting" technique. (The court held this second argument was premature and denied this challenge without prejudice).

As to the defendants' first argument, the court's analysis began with an examination of Federal Rule 702, which governs the admissibility of witness testimony under Daubert. This standard provides that a witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case. The court also noted a number of nonexclusive factors may be relevant to the reliability inquiry, including: (1) whether the technique has been tested, (2) whether the technique has been subjected to peer review and publication, (3) the potential error rate, (4) the existence and maintenance of standards controlling the technique's operation, and (5) whether the technique is generally accepted in the relevant scientific community. [Citation Omitted].

Addressing the defendants' specific challenge, the court emphasized that both the reliability and the fit prongs of the Daubert examination require that an expert's analysis be reasonably connected to the facts of a case. However, this requirement does not require that expert testimony be relevant to every single issue in the case. This court believed that studies conducted in more confined working environments will nonetheless be of "some use" to the jury in setting the upper-bounds of the plaintiff's possible exposure to asbestos from any one particular activity. The court used the following analogy to illustrate the point: Although it does not provide an exact fit, it has found to be "acceptable to introduce evidence examining whether a chemical causes cancers in animals when examining whether that chemical causes cancer in humans because the animal studies would be of some use in eliminating those chemicals not likely to cause disease in humans". [Citation Omitted]. Further, the defendants will have the opportunity to use cross-examination to highlight that the plaintiff did not perform all of the activities examined in some of the studies cited by Dr. Millette. Accordingly, the court denied the majority of the defendants' Daubert challenge to Dr. Millette's proposed testimony.

Although the court believed that Dr. Millette can testify as to laboratory studies that were not substantially similar to the plaintiff's working environments, the court will require that (1) those studies be put in the proper context, and (2) the plaintiffs will not be able to use Dr. Millette's testimony as a subterfuge to speculate as to the plaintiff's working conditions. It is neither reliable nor permissible for Dr. Millette to testify — as he suggests in his expert report — that

the studies conducted in wholly disparate working environments represents the likely exposure plaintiff had from performing a particular activity on a ship. Accordingly, the court will grant the defendants' motion insofar as Dr. Millette cannot testify that a particular study represents plaintiff's likely exposure to asbestos until—at the very least—making a threshold showing in a Daubert hearing that that study took place under conditions substantially similar to the plaintiff's working conditions.

Read the full decision here.

Plaintiffs' Experts' Testimony of General Causation Not Permitted to Prove Specific Causation in Mesothelioma Case

(U.S. District Court for the Eastern District of Louisiana, October 5, 2016)

The defendants moved in limine to preclude testimony of the plaintiffs' experts Drs. Kradin, Kraus and Parker for their reliance on the "each and every exposure" methodology of causation.

The court began its analysis by stating the standard for expert qualification, which includes: 1) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact issue 2) the testimony is based on sufficient facts or data 3) the testimony is the product of reliable principles and methods and 4) the expert has reliably applied the principles and methods to the facts of the case. Additionally, factors to consider include whether the technique has been tested, whether the technique has been subjected to peer review and publication, the potential error rate, the existence of maintenance of standards controlling the technique's operation, and whether the technique is generally accepted in the relevant scientific community.

As for Dr. Kradin, the defendants argued that he should be excluded for terminating his deposition early and prior to completion. However, the court noted that the deposition had since concluded and that exclusion on those grounds would be "disproportionate." The defendants also argued that Dr. Kraus should be excluded as an expert because he lacked qualifications to discuss causation of the plaintiff's mesothelioma as a radiation oncologist. The court disagreed and stated that the standards are liberal and an expert's qualification need not be perfect.

However, the court launched into an analysis of "each and every exposure" and pointed out the court "continues" to reject such a proposition calling it an argument ipse dixit. The plaintiff's experts tried to circumvent this challenge by stating that each and every significant exposure was the cause of the plaintiff's mesothelioma. The court was not persuaded and found no material difference between each and every exposure and every significant exposure. Accordingly, the court would not permit the plaintiffs' experts to testify generally in causation to meet their burden of causation specific to this plaintiff.

Read the full decision here.

Court Reverses Verdict Against Crane Co. and Remands as to Cigarette Defendants After Daubert Challenge

(Florida District Court of Appeal, Fourth District, September 14, 2016)

Plaintiff Richard Delisle filed suit against multiple defendants alleging he developed mesothelioma as a result of exposure to sheet gaskets manufactured by Crane Co. and from the asbestos fibers from Micronite filters from smoking Kent cigarettes. The jury found both defendants' products were a substantial contributing cause (SCC) of the development of Delisle's mesothelioma. Both defendants unsuccessfully moved for directed verdicts and filed for appeal.

Crane Co. argued that the plaintiff's expert, Dr. James Dahlgren should not have been permitted to testify as an expert under Daubert. R.J. Reynolds also brought a Daubert challenge of experts Drs. Millette, Crapo, and Rasmusson.

The court began its analysis with laying out the standard for expert qualifications. Florida adheres to the Daubert standard which states that a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion or otherwise, if: 1) The testimony is based upon sufficient facts or data; 2) The testimony is the product of reliable principles and methods; and 3) The witness has applied the principles and methods reliably to the facts of the case. The role of the trial court is to act as a gatekeeper, excluding evidence

unless it is reliable and relevant. Taking the expert's word or own assertions for his or her opinion is not enough to pass the gatekeeper.

Dr. James Dahlgren: The court found that Dr. Dahlgren followed a two prong test to determine causation. First, he "looked at the ability of the substance to cause disease" and second "whether the particular individual had sufficient exposure to the substance to have that health effect." The court also concluded that Dr. Dahlgren used the Bradford Hill criteria for determining causation. Dr. Dahlgren testified that both chrysotile and crocidolite asbestos can cause mesothelioma. On cross exam, he stated that both chrysotile and crocidolite were "probably" of the same potency. For his opinion, Dr. Dahlgren did not cite any results from animal studies. Further, he relied on another expert's study but that study discussed crocidolite only. Finally, he conceded that many studies suggested that crocidolite asbestos was far more potent than chrysotile. More importantly, Dr. Dahlgren took the position that "every exposure" to asbestos above background is a SCC to the development of mesothelioma. The court found that the trial court abused its discretion in admitting Dr. Dahlgren as an expert. Specifically, Dr. Dahlgren had not explained his Bradford Hill methodology at all. Moreover, Dr. Dahlgren did not furnish any data or studies related to his assertion that chrysotile can cause mesothelioma in low doses. His assertions that "all types of asbestos" were of the same potency were nothing more than assumptions according to the court. Finally, the court noted that the opinion that every exposure to asbestos above background is a SCC has been rejected numerous times by courts. Dr. Dahlgren's opinion was the only opinion on causation against Crane. Accordingly, the court ordered a directed verdict be entered in favor of Crane.

Dr. William Longo: Lorillard moved to exclude the opinions or testimony of Dr. Longo as unreliable. The plaintiff's agreed that his testing would not be part of the case. However, despite this assurance his studies came up many times during trial.

Dr. James Millette: Dr. Millette had performed studies on Kent cigarettes and was offered as an expert in this matter. Dr. Millette described in detail the process by which he tested for asbestos fibers in the smoke of Kent cigarettes. The testing included outsourcing to a third party lab and was conducted under different "puff" amounts. Further, the filters were dissolved in an acid wash and run through a centrifuge. The detection levels for asbestos fibers were different based on the "puff" amounts. The court honed in on the fact that Dr. Millette had testified in depth about his methodologies. Accordingly, Dr. Millette's testimony would stand.

Dr. James Crapo: The court also found that the trial court abused its discretion in admitting Dr. Crapo as an expert. Dr. Crapo was of the opinion that mesothelioma was not caused by exposure to chrysotile unless in high doses. Notably, Dr. Crapo opined that "what I'm trying to tell you is putting crocidolite, a very, very dangerous fiber, into a filter and having a person put that in his mouth and suck on it,… that sounds very dangerous to me." The court found his opinion unreliable and without foundation. However, the court hinted that he could have been admitted but more was needed to make a proper determination.

Dr. James Rasmuson: A Daubert challenge was brought as to Dr. James's reliability as an expert. Specifically, Dr. Rasmuson opined that the plaintiff's mesothelioma could be attributed to exposure to crocidolite from smoking the Kent cigarettes. His opinion was based solely on reliance upon Dr. Longo's studies. He stated that Dr. Longo's methodology "sounded" reasonable to him but conceded he did not know whether it was an acceptable methodology. The court found that he passed the first test of reliability and helpfulness to the jury on the issue of low-level exposure to crocidolite. However, the court found that his lack of knowledge as to whether Dr. Longo's methodology was acceptable prevented him from offering opinion on the subject of exposure specific to Kent cigarettes. The case was remanded as to the two cigarette defendants.

Finally, the court also ordered a new trial on damages as the jury improperly relied on the fees of the plaintiff's experts in its calculation of a verdict.

Read the full decision here.

Appellate Court Allows Industrial Hygienist's Reliance on Hearsay Evidence in Overturning Summary Judgment in Favor of Defendant Lumber Company

(Court of Appeal of California, First Appellate District, Division One, July 27, 2016)

The plaintiff, Jerry Charlifue, sued Goodman Lumber Company after he was diagnosed with mesothelioma. He worked as a taper and painter for U.S. Taping Company between 1972 and 1978. His duties involved applying joint compound and smoothing out walls and ceilings where drywall had been hung. The plaintiff worked with dry joint compound for the first three to four years of the job, which produced respirable dust.

Goodman moved for summary judgment on the basis that the plaintiff could not prove that he was exposed to an asbestos-containing product it supplied. In response, the plaintiff asserted that he purchased various brands of joint compound from Goodman, including Kaiser Gypsum and US Gypsum. To establish that these products contained asbestos, the plaintiff proffered the former deposition testimony of the corporate representatives of Kaiser Gypsum and US Gypsum, which indicated that those companies did not phase out asbestos-containing joint compounds until approximately 1976. He also submitted a declaration by William Ewing, an industrial hygienist, stating that it was "more likely than not any joint compound materials that were supplied by Goodman…to U.S. Taping before 1976 were asbestos-containing." The plaintiff further sought for the court to take judicial notice of a patent for an asbestos-free joint compound issued to US Gypsum in 1975 which, according to the plaintiff, indicated that it "was the first ever application for an asbestos-free joint compound to be produced in the United States."

The court granted Goodman's motion for summary judgment, finding that the plaintiff failed to generate a triable issue as to whether he was exposed to asbestos-containing products sold by Goodman. In doing so, it sustained defense objections to the use of the prior Kaiser Gypsum and US Gypsum corporate designee testimony, the Ewing declaration and the US Gypsum patent.

The appellate court reversed the decision. It found that, while the prior deposition testimony and joint compound patent evidence constituted inadmissible hearsay, the trial court's ruling on the Ewing declaration was an abuse of discretion. Specifically, Ewing was permitted to rely upon hearsay (the former deposition testimony and the patent application) because it was reliable and of the type reasonably relied upon by experts in the field. Accordingly, the plaintiff had raised a triable issue as to whether he was exposed to asbestos from products sold by Goodman. Viewing the evidence in the light most favorable to the plaintiff, the appellate court found that it was sufficient to show that Goodman may have supplied the joint compound with which the plaintiff worked, and the Ewing declaration suggested that any joint compound supplied by Goodman during the relevant time period must have contained asbestos.

Read the full decision here.

Supreme Court Finds Plaintiff's Expert "Cumulative Exposure Theory" Does Not Fit Georgia Causation Standard and Reverses Judgment in Favor of Defendant

(Georgia Supreme Court, July 5, 2016)

In a follow up to a case previously reported on in ACT, the Georgia Supreme Court granted a writ of certiorari to review the decision of the Court of Appeals of Georgia with respect to the admission of testimony from the plaintiff's expert, Dr. Jerrod Abraham, and his "Cumulative Exposure Theory."

This case first commenced when the plaintiff and his wife, Roy and Milva Knight, sued Scapa Dryer Fabrics, Inc., alleging that Roy's mesothelioma was caused from exposure to asbestos while he was working as an independent sheet metal contractor at Scapa's facility. During the trial, the jury heard other evidence of 29 additional non-party entities associated with products that may have also exposed Roy to asbestos. The jury found against Scapa and Union Carbide, and apportioned liability as follows: 40 percent Scapa; 40 percent Union Carbide; and 20 percent Georgia Pacific. Based on the apportionment, the trial court entered judgment against Scapa in the amount of $4,187,068.95. However, Scapa subsequently appealed on multiple evidentiary rulings, most notably the admissibility of Dr. Abraham's testimony (Union Carbide settled after the verdict was not part of the appeal).

In the prior decision, *Scapa Dryer Fabrics, Inc. v. Knight, 332 Ga. App. 82 (Ga. Ct. App. 2015*), defendant Scapa argued at trial and on appeal that Dr. Abraham's theory of "cumulative exposure" was not reliable in a scientific sense, the theory did not comport in any event with the legal requirements for causation in Georgia, and an expert opinion on causation that is derived from that theory is inadmissible. The trial court rejected these arguments and a divided seven-judge panel of the Court of Appeals of Georgia rejected them and affirmed the judgment of the trial court.

The Georgia Supreme Court granted the writ of certiorari on the issue of Dr. Abraham's testimony only. The plaintiff offered Dr. Jerrod Abraham as a pathologist who offered a "cumulative exposure" or "each and every exposure" theory with respect to causation. According to Dr. Abraham, the precise point at which cumulative exposure is sufficient to cause any particular person to develop mesothelioma is not scientifically knowable, and for that reason, when a person actually has mesothelioma, it can only be attributed to his cumulative exposure as a whole. Because each and every exposure to respirable asbestos in excess of the background contributes to the cumulative exposure,

Dr. Abraham reasoned, each exposure in excess of the background is a contributing cause of the resulting mesothelioma, regardless of the extent of each exposure.

In its review, the Georgia Supreme Court noted that, for the most part, the standard set forth with respect to the admissibility of expert testimony under Georgia evidentiary law was borrowed from *Federal Rule of Evidence 702.* Thus, when considering the meaning of the Georgia standard, the Georgia Supreme Court commonly looks for guidance in the decisions of the federal appellate courts construing and applying *Rule 702.* In considering the federal law with the Georgia standard, the Georgia Supreme Court emphasized that, generally, a trial court must assess three aspects of proposed expert testimony – the qualifications of the expert, the reliability of the testimony, and the relevance of the testimony. [Citation Omitted]. Specifically, (i) as for the qualifications, the trial court must examine the credentials of the expert; (ii) as for the reliability, the trial court must consider whether "the methodology by which the expert reaches his conclusions is sufficiently reliable; and (iii) as for the relevance, trial court must consider the "fit" between the expert testimony and the issues in dispute.

Scapa did not dispute that Dr. Abraham has adequate credentials to qualify as an expert. However, Scapa vigorously disputes the reliability of his testimony, asserting that the cumulative exposure theory by which Dr. Abraham developed his opinions on causation is not scientifically valid and is, to the contrary, "junk science." Scapa also disputes the relevance of his testimony, arguing that it simply does not "fit" the pertinent causation inquiry under Georgia law. To prove causation against Scapa under Georgia law, Plaintiff must show that his exposure to asbestos related to Scapa was a "contributing factor in bring about his mesothelioma. [Citation Omitted]. Georgia Courts have previously rejected the notion that the contribution to the resulting injury must be substantial to show legal causation. However, a "de minimus" contribution is not enough. In other words, although the plaintiff did not need to provide his exposure related to Scapa was a substantial contribution to his mesothelioma, they did have to show it made a meaningful contribution.

The Georgia Supreme Court held, *in the circumstances of this case*, the critical opinion conveyed by Dr. Abraham in his testimony— that any exposure to asbestos was a cause of the plaintiff's mesothelioma, regardless of the extent of the exposure — does not "fit" the legal standard for causation, and for that reason, the admission of his testimony under Georgia law was not helpful to the jury and amounted to an abuse of discretion. And given that Dr. Abraham's opinion "went to the heart" of the dispute about the extent of exposure and causation, "the erroneous admission of the opinion requires that the Georgia Supreme Court REVERSE the Court of Appeals' affirmance of the trial court's judgment.

Read the full decision here.

Preclusion of Plaintiff's Causation Expert Upheld on Appeal Due to Failure to Consider Decedent's Smoking History

(Court of Appeal of Louisiana, Fourth Circuit, June 22, 2016)

The plaintiffs, Dwayne Bourdeaux, Gerilyn Cook, and Bryan Bourdeaux, Individually and as Proper Parties in Interest for Gerald Bourdeaux, filed suit in Louisiana alleging that Gerald Bourdeaux lung cancer diagnosis and eventual death was asbestos exposure. In support of this claim, the plaintiffs offered Dr. Gerald E. Liuzza, a pathologist, as an expert witness to establish the causative link between the asbestos exposure and lung cancer.

Defendant Trinity Industries, Inc. filed a motion in limine to preclude Dr. Liuzza from testifying at trial on the grounds that his opinion regarding medical causation, and the methodology by which he arrived to it, were not satisfactory under the law. Trinity concurrently filed a motion for summary judgment in the event the court excluded Dr. Liuzza's testimony. The trial court granted defendant's motion to exclude Dr. Liuzza's testimony and consequently defendant's motion for summary judgment. The plaintiff appealed and the Court of Appeal of Louisiana, Fourth Circuit provided a decision on June 22, 2016.

In its motion to exclude, Trinity argued the trial judge should strike Dr. Liuzza's opinion on medical causation because the methodology used in reaching his opinion was flawed in two respects. First, Trinity pointed out that, while he acknowledged that cigarette smoking is the leading cause of lung cancer, Dr. Liuzza nevertheless did not know about, and thus did not consider, Mr. Boudreaux's thirty-year history of smoking three packs of cigarettes a day. Second, Trinity noted that Dr. Liuzza formed his causation opinion without any underlying evidence regarding the dosage of asbestos received by Mr. Boudreaux via occupational exposure. Trinity claim, in a normal case, a plaintiff's pathologist is not qualified to calculate asbestos dosage and so will rely upon the opinion of the plaintiff's industrial hygienist when forming his opinion on causation. In this case, Trinity notes, Dr. Liuzza formed his opinion

without the benefit of an industrial hygienist's dosage report, but relied instead upon twenty-five pages excerpted from the 108-page deposition of Terry Thibodeaux, one of Mr. Boudreaux's co-workers. Based on these excerpts, Dr. Liuzza assumed that Mr. Boudreaux was exposed to asbestos on a near-daily basis. When asked at deposition, however, about various work-related factors that could impact the extent of Mr. Boudreaux's historical exposure, factors discussed by the co-worker in the 83 pages of deposition not provided to him, Dr. Liuzza conceded that he would have to defer to an industrial hygienist.

The plaintiffs argued Dr. Liuzza did consider Mr. Boudreaux's smoking history when formulating his opinion, and pointed in support to this statement from his report: "Most workers in Mr. Boudreaux's field are smokers. If Mr. Boudreaux did in fact also have a significant tobacco exposure, then I would attribute his lung cancer to the combined effects of asbestos and tobacco." The plaintiffs further pointed out that when confronted by Trinity's counsel with the evidence of Mr. Boudreaux's smoking history, Dr. Liuzza altered his opinion during the course of the deposition to conclude that Mr. Boudreaux's lung cancer could be attributed to a combination of asbestos and tobacco. With respect to Trinity's second argument, the plaintiffs asserted that no scientific standard required Dr. Liuzza rely solely upon an industrial hygienist when estimating Mr. Boudreaux's exposure history. Rather, the plaintiffs argued that the jurisprudence indicates that Dr. Liuzza was justified in relying solely upon the 25 pages of deposition extracts provided to him by counsel.

Upon its review, the Court of Appeals emphasized that is well-established that the trial court is afforded wide discretion in determining whether expert testimony should be admitted and who should or should not be qualified as an expert. A trial court's decision to qualify an expert will not be overturned absent an abuse of discretion. The abuse-of-discretion standard is highly deferential to the trial judge's determination under consideration and generally results from a conclusion reached capriciously or in an arbitrary manner. "Arbitrary or capricious" means the absence of a rational basis for the action taken. See *A.S. v. D.S.*, 14-1098, p. 17 (La. App. 4 Cir. 4/8/15), 165 So.3d 247, 257. In this matter, the trial judge excluded Dr. Liuzza's testimony from trial after concluding that his failure to consider Mr. Boudreaux's thirty-year history of smoking three packs of cigarettes a day, family medical history, and the remainder of Mr. Thibodeaux's deposition to be so divergent from scientific medical practice as to render his methodology unreliable. Accordingly, the Court of Appeal of Louisiana found no abuse of discretion in the exclusion of Dr. Liuzza's expert opinion testimony.

Read the full decision here.

Federal Court Limits Plaintiff's Expert, Dr. William Longo's, Testimony

(U.S. District Court for the Middle District of Florida, Jacksonville Division, June 21, 2016)

The plaintiff, Marsha K. Dugas, as Personal Representative of the Estate of Darryl S. Dugas, filed suit in the U.S. District Court for the Middle District of Florida, Jacksonville Division, alleging that Darryl Dugas developed mesothelioma from his exposure to asbestos during the late 1960s and early 1970s, while serving in the U.S. Navy and attributing that exposure to several products allegedly manufactured by various defendants. In support of this claim, the plaintiff retained Dr. William Longo to provide an expert opinion as to the causation of Dr. Dugas's diagnosis. Several defendants filed motions in limine to exclude Dr. Longo's testimony under Daubert.

On June 21, 2016, the court ruled upon the following motions in limine: Defendants' Henkel Corporation and Dexter-Hysol Aerospace, LLC's Motion to Exclude Dr. Longo's Opinions and Experimental Tests under Daubert; Defendant United Technologies Corporation's (UCT) Motion to Exclude MAS Work Practice Study (Clamp Study); UCT's Amended Motion to Exclude Opinions of William E. Longo; and
Henkel and Dexter Motion to Exclude Longo's Opinions and Experimental Tests under Daubert

This motion is predicated upon the plaintiff's exposure to the product "EPON 934," which was an asbestos-containing, two-part adhesive, originally developed and sold by the Shell Chemical Company. The user would need to mix both parts at a ratio of 100 parts of part A and 33 parts of part B, and then allow the mixed material to set. Dugas allegedly used this product while repairing the exterior of A-7 aircrafts during his Navy service.

Dr. Longo opined that Mr. Dugas "would have been exposed to significant levels of airborne asbestos fibers" while Mr. Dugas was "sanding" and "filing" asbestos-containing adhesives such as EPON 934. Following his initial report, Dr. Longo created several work-practice experiments which involved Dr. Longo's attempts to recreate EPON 934 and to test his version of EPON 934 under work practices similar to those employed by Mr. Dugas. With respect to these experiments, Dr. Longo was provided with the "manufacturing instructions" for EPON part A and part B which set out the formula and procedures for their mixture. The defendants argued that Dr. Longo's opinion and results should be excluded because he failed to apply a reliable methodology, and he failed to rely on sufficient facts and data. The

defendants focus on Dr. Longo's deviations from: (1) the EPON 934 formula card; (2) the manner in which Mr. Dugas used EPON 934; and (3) the environmental conditions under which Mr. Dugas used EPON 934.

In response to the defendants' arguments, Dr. Longo admitted his method of recreation of EPON 934 did not adhere to the formula provided and conceded that this work-practice study would not necessarily replicate the level of asbestos exposure that Mr. Dugas encountered. However, Dr. Longo explained his deviations were appropriate because (1) there were not any substantial differences between the materials called for by the formula and the materials which he actually used; (2) they were necessary in light of practice considerations; and (3) it would be impossible to simulate and accurately replicate the variables associated with the environmental conditions that Mr. Dugas faced.

Henkel and Dexter ultimately sought to exclude Dr. Longo's opinions ***and*** testing because of these deviations from the manufacturing instructions and his failure to replicate the work practices and conditions of Mr. Dugas. The court noted that admissible experimental and demonstrative evidence need not "be precisely reproduced, but they must be so nearly the same in substantial particulars as to afford a fair comparison in respect to the particular issue to which the test is directed" when such evidence is offered as a "recreation of the accident . . . ." *Burchfield v. CSX Transp., Inc.*, 636 F.3d 1330, 1334, 1336-37 (11th Cir. 2011) (internal quotations and citations omitted). However, when evidence "is offered only as an illustration of general scientific principles, not as a reenactment of disputed events, it need not pass the substantial similarity test[,]" but the evidence should be presented without suggesting that it simulates the relevant conduct. *Burchfield*, 636 F.3d at 1334-35.

In the case at bar, the court found that the plaintiff was not seeking to offer Dr. Longo's work-practice study as reenactment evidence. Rather, the study was offered as one which demonstrates the effect of applying an abrasive material such as sand paper to an asbestos-containing adhesive similar to the one which Mr. Dugas worked with. With that in mind, the court concluded that Dr. Longo's opinion assisted the jury regarding the release of respirable asbestos fibers, and to the extent of Henkel and Dexter's challenge, they are free to make those points to the jury on cross-examination at trial.

The court clarified that, in admitting that Dr. Longo's opinions from his work-studies, "demonstrative exhibits tend to leave a particularly potent image in the jurors' minds." Citation Omitted. In turn, this leads to the potential that Dr. Longo's video demonstration may unfairly prejudice defendants. For that reason, the court limited the plaintiff to presenting Dr. Longo's work-studies as illustrative of physical principles and not as reenactment evidence replicating the actual levels of asbestos Mr. Dugas encountered. Thus, all demonstrative evidence, including videos of the work-studies, was excluded for being unfairly prejudicial.

As to this motion in limine, the Court DENIED in part and GRANTED in part as follows:

Longo may opine that the sanding and filing of EPON 934 releases significant levels of respirable asbestos fibers
Plaintiff shall not introduce videos of Dr. Longo sanding EPON 934 on direct examination

Longo shall not opine on the quantity of asbestos fibers Mr. Dugas encountered while working with EPON 934

UCT's Motion to Exclude "Clamp Study"

UTC's motion to exclude Dr. Longo's "Clamp Study" focuses on Mr. Dugas's alleged asbestos exposure from his work with asbestos-containing clamps aboard an A-7 aircraft.

Dr. Longo conducted a "clamp study" which was based on 45 clamps and two wire insulation samples. Thirty-nine (39) of the clamps were "new" clamps of unknown origin, while the remaining materials were collected from a commercial aircraft engine. Thus, UTC claimed that Dr. Longo's clamp study failed to simulate the conditions Mr. Dugas faced while serving in the Navy and that Dr. Longo failed to apply a reliable methodology interpreting the results. UTC also contended the clamps tested were not representative of the clamps which would have been present on the engines with which Mr. Dugas worked. Further, UTC argued the manner in which the clamps were tested were not representative of what would have been present on the aircraft Mr. Dugas was working on. Finally, UTC argues that Dr. Longo deviated from OSHA recommendations as to OSHA Method ID-160 which provides guidelines for collecting air samples.

In response, Dr. Longo concede the clamp study did not replicate Mr. Dugas's working environment, but the study would demonstrate whether the clamps would release measurable amounts of respirable asbestos fibers. Dr. Longo did not dispute UTC's argument regarding the manner in which the clamps were tested but argued that issue should be addressed on cross-examination. Dr. Longo clarified defendants OSHA argument by explaining that his deviation

actually improved the accuracy of the detection limits in the air sampling in that it caused asbestos to be detected where strict adherence to protocol previously produced no detection of asbestos.

In its review, the court is outlined four guiding factors for district courts to consider when evaluating an expert's methodology: (1) whether the expert's methodology has been tested or is capable of being tested; (2) whether the theory or technique used by the expert has been subjected to peer review and publication; (3) whether there is a known or potential error rate of the methodology; and (4) whether the technique has been generally accepted in the relevant scientific community.

In this case, the court found that the plaintiff failed to establish that any of these factors weigh in favor of admitting Dr. Longo's opinion. The court concluded, while they might be inclined to leave some of Dr. Longo's questionable tactics for the jury to resolve through cross-examination and competing expert testimony, in this case, it is clear from Dr. Longo's deviations both in the development of the clamp study and his subsequent failure to follow any generally accepted, peer-reviewed, substantiated, or published methodology for interpreting his results that his opinion's underpinnings are unreliable.

Accordingly, the court GRANTED Defendant's motion to exclude Dr. Longo's opinions as to the clamp study.

UCT's Motion to Exclude Dr. Longo's Opinions

Finally, UCT challenged Dr. Longo's method of analysis of a surface sample of dust taken from the engine bay of an abandonded airframe. Dr. Longo used the American Society for Testing and Materials D5755 to analyze the surface sample. Defendant's expert contends the use of D5755 to analyze surface samples "is a not reliable, tested, and generally accepted analytical method for assessing occupational exposure to airborne asbestos. In fact, Dr. Longo's depostion testimony corrorabates this opinion. In addition, to applying an unreliable analytical method, Dr. Longo admitted he did not follow the D5755 protocol because he only took one simple sample from the tested airframe (rather than the minimum of three samples). Dr. Longo explained that this deviation does not invalidate his conclusion becase the three sample sizes are not needed for such a small area.

The court ulimately found that Dr. Longo failed to support his use of D5755 to quantify the levels of asbestos present in the surface sample at issue; to follow the D5755 protocol; to account for variables associated with using an abandoned A-7 airframe; and to explain how he extrapolated his surface sample results to the airborne exposure Mr. Dugas would have encountered.

Accordingly, UCT's motion to exclude Dr. Longo's opinions as to the surface sample dust was GRANTED.

Read the full decision here.

Plaintiff's Expert Testimony Precluded and Summary Judgment Granted Where Expert Opinion Did Not Rely Upon Sufficient Facts or Data

(U.S. District Court for the District of Maryland, June 6, 2016)

Plaintiffs Charles Lemuel Arbogast, Jr., et al. filed suit against a number of companies, including defendant CBS Corporation of Delaware (Westinghouse), that allegedly manufactured and/or distributed products containing asbestos to which the plaintiff was exposed, thereby causing his mesothelioma.

The plaintiff offered Dr. Robert Leonard Vance as an expert in matters involving industrial hygiene and asbestos exposures. Dr. Vance's written opinion as to Westinghouse focused on two products: asbestos "socks" and Micarta. The plaintiff later conceded that that no liability existed as to the asbestos "socks." Dr. Vance's written opinion states,"Mr. Arbogast produced electrical panel boards from asbestos containing Bakelite and Micarta panel board." Dr. Vance acknowledge this opinion relies strictly upon the plaintiff's deposition testimony. However, on cross-examination, defense counsel elicited from the plaintiff that his basis for statements that Micarta contained asbestos was "just talking in the shop" but he could not recall with you.

Westinghouse filed a motion *in limine* to exclude Dr. Vance and argued his opinion as to Micarta "is grounded in neither sufficient facts nor data, is not the product of reliable principles and methods, and contains that would assist the trier of fact." Upon reviewing the only available support for Dr. Vance's opinion, plaintiff's deposition testimony, the court found the plaintiff's testimony as inconclusive, at best, on the alleged asbestos content of Micarta. Consequently, the court concluded Dr. Vance's opinion rests only upon an unwarranted assumption rather than

"sufficient facts or data," as required by the Federal Rules of Evidence, Rule 702(b) and Dr. Vance's opinion that the plaintiff was exposed to asbestos by working with Micarta was excluded from the case.

Westinghouse also filed a motion for summary judgment claiming that the plaintiff failed to provide any evidence that established that a Westinghouse product actually contained asbestos and was a source of plaintiff's exposure. The court found, that because of the failure of proof of an essential element of the plaintiff's case, Westinghouse was entitled to summary judgment as a matter of law.

Read the full decision here.

Court Denies Honeywell's Appeal on Expert and Causation Challenges and Reverses Directed Verdict on Punitive Damages in Plaintiff's Favor

(Court of Appeals of Ohio, May 26, 2016)

The defendant, Honeywell International appealed the judgment entered upon a jury verdict that found Honeywell was five percent responsible for the injuries of the decedent Kathleen Schwartz, who died from peritoneal mesothelioma. The amount of the judgment against Honeywell was $1,011,639.92. The plaintiffs filed a cross-appeal challenging the trial court's decision to grant a directed verdict against them on their claim for punitive damages.

Honeywell's appeal challenged the trial court's denial of motions in limine and the court's denial of a motion for directed verdict. Honeywell first challenged the admissibility of the plaintiff's expert Dr. Bedrossian, a board certified pathologist. Specifically, Honeywell claims the court erred in allowing Dr. Bedrossian to testify that: (1) an individual's "total and cumulative exposure to asbestos, from any and all products, containing any and all fiber types" is a significant contributing factor to the development of mesothelioma;(2) evidence of any asbestos exposure from a product (regardless of fiber type or dose) establishes, unless proven otherwise, that the product caused an individual's mesothelioma; and (3) brake dust caused decedent's peritoneal mesothelioma: these opinions are based on an untested hypothesis that lacks any indicia of reliability and, therefore, should not have been admitted. The court denied Honeywell's appeal and noted similar criticisms were also rejected by this court in *Walker v. Ford Motor Co*., 8th Dist. Cuyahoga No. 100759, 2014-Ohio-4208. As recognized in *Walker*, "an expert's opinion need not be generally accepted in the scientific community to be sufficiently reliable" and "'[e]ven a novel or "controversial" opinion may be reliable if founded on a proper methodology.'"(Citation omitted). "The credibility of the conclusion and the relative weight it should enjoy are determinations left to the trier of fact." (Citation omitted). Further, Honeywell was able to challenge Dr. Bedrossian's testimony through cross-examination and was able to present the testimony of its own expert witnesses.

Under Honeywell's second argument, they argued the trial court erred by permitting the plaintiff's expert, Joseph Guth, Ph.D., a certified industrial hygienist, to testify, over objections, that decedent's father's occasional non-occupational work with Bendix brakes created a sufficient level of dust that is substantially contributed to increasing decedent's risk for developing peritoneal mesothelioma because such an opinion lacks any foundation in science or fact. The court again denied this appeal determining they were not persuaded by Honeywell's argument that Dr. Guth's opinions were not supported by peer-reviewed literature. Even had there been a lack of peer review or general acceptance by the scientific community, these are not prerequisites to admissibility, and that relevant evidence based on valid principles will satisfy the threshold reliability standard for the admission of expert testimony. The credibility to be afforded these principles and the expert's conclusions remain a matter for the trier of fact."(Citation omitted) Next, Honeywell argued the trial court erred by denying the defendant's motion for a directed verdict as to the plaintiff's claims, because the plaintiff's evidence was legally insufficient to establish that Honeywell's product was either generally or specifically causative of the decedent's peritoneal mesothelioma. The court stated that in cases involving exposure to a toxic substance, expert medical testimony is generally necessary to establish both general causation, i.e., that the toxic substance is capable of causing the particular disease, and specific causation, i.e., that the disease was in fact caused by the toxic substance. Further, the Ohio Supreme Court has held that for each defendant in a multi-defendant asbestos case, the plaintiff has the burden of proving exposure to the defendant's product and that the product was a substantial factor in causing the plaintiff's injury. Using the "substantial factor test", the court affirmed that Schwartz's exposure to asbestos allegedly caused from the Bendix brake product met this standard, and denied Honeywell's appeal.

Honeywell also argued that the trial court erred denying the defendant's motion for a directed verdict as to plaintiff's statutory claim for design defect, and that under Ohio law, the plaintiff's evidence at trial was legally insufficient because plaintiff failed to present any evidence that a practical and technically feasible alternative design or formulation was available at the time of use which would not have substantially impaired the usefulness or intended

purpose of the defendant's product. The court noted that a product will not be considered defective in design unless the plaintiff demonstrates that a practical and technically feasible alternative design to the product was available that would have prevented the harm for which the plaintiff seeks to recover, without substantially impairing the usefulness of the product. Additionally, expert testimony is not necessary to establish a design-defect claim if the subject matter involved is not overly complex and is within the knowledge and comprehension of a layperson. The court denied Honeywell's appeal finding that, in this case, there was testimony and evidence showing that Bendix was manufacturing non-asbestos-containing brakes during the period of time relevant to this case. Further, there was evidence that "semi-metallics [non-asbestos-containing brakes] operate satisfactorily" in passenger cars and "[t]he improved performance of semi-metallics compensates for their higher costs[.]" In sum, there was evidence supporting the plaintiffs' claim that a safer, practical, and technically feasible alternative design was available.

The plaintiff, Mark Schwartz, Individually and as Executor of the Estate of Kathleen Schwartz, also filed a cross-appeal arguing the trial court erred in granting a directed verdict against the plaintiffs on their claim for punitive damages where the jury heard evidence establishing that defendant acted with "conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm." Previously in this case, Honeywell had filed a motion to dismiss the claim for punitive damages, but requested the court to bifurcate the punitive damages phase of the trial until after the compensatory damages phase concluded. The plaintiffs had no objection to the bifurcation. The trial court granted the motion to bifurcate and deferred ruling on the motion to dismiss. On appeal, the plaintiffs argue the trial court erred because there was substantial evidence in the record to support punitive damages, specifically evidence that revealed Bendix sold asbestos-containing brakes for more than 30 years after it had developed an asbestos-free alternative; that Bendix delayed placing adequate warnings on its product and delayed manufacturing asbestos-free brakes because of the cost concerns; and that Bendix engaged in the foregoing conduct after having direct knowledge that asbestos in brake dust causes mesothelioma. The court ultimately found that the plaintiffs presented substantial and competent evidence to defeat a motion for a directed verdict, and on remand, directed the trial court to conduct a new trial on the issue of punitive damages.

Read the full decision here.

Plaintiff's Expert's Testimony Precluded and Summary Judgment Granted Where Expert Disclosure Was Untimely, the Expert Opinion Lacked Sufficient Factual Basis, and Plaintiff's Claims Were Legally Insufficient on Causation

(U.S. District Court for the District of Maryland, May 18, 2016)

In this case, the plaintiff sued numerous manufacturers and distributors of products allegedly containing asbestos, including defendant General Electric Company (GE), following his diagnosis of mesothelioma.

The plaintiff designated Dr. Robert Vance, an industrial hygienist, to testify regarding the sources of the plaintiff's asbestos exposure. As to GE, Dr. Vance noted in his report that the plaintiff claimed to have worked with GE generators and asbestos-braided wiring at various job sites. Dr. Vance did not offer an opinion in his report regarding the plaintiff's alleged exposure to GE marine turbines. On cross-examination at his deposition, Dr. Vance clarified that was only offering an expert opinion in the case in connection with GE wiring. However, upon later questioning by the plaintiff's counsel, Dr. Vance claimed that the plaintiff also would have been at risk of exposure by working in proximity to GE marine turbines.

GE moved *in limine* to exclude Dr. Vance's testimony regarding the plaintiff's exposure to asbestos from GE marine turbines on the basis that Dr. Vance's opinions were untimely and improperly disclosed pursuant to Rule 26 of the Federal Rules of Civil Procedure, which requires a complete disclosure all expert opinions pursuant to the scheduling order. The court found that Dr. Vance's opinion regarding GE marine turbines was untimely and was neither substantially justified nor harmless — such that exclusion of the opinion was an appropriate remedy pursuant to Federal Rule 37.
Additionally, GE argued that Dr. Vance's testimony was inadmissible per Federal Rule of Evidence 702 because it lacked a sufficient factual basis. In opining that the plaintiff was exposed to asbestos from GE wire, Dr. Vance had specifically relied upon testimony by the plaintiff that the plaintiff believed GE wire contained asbestos. Dr. Vance had no knowledge regarding the asbestos content of GE wire or the type of asbestos, if any, that was in the GE wire. Dr. Vance had not seen or reviewed any documentation indicating that GE wire actually contained asbestos during the relevant time period. The court agreed that Dr. Vance's opinion was, indeed, based on insufficient facts or data and was therefore inadmissible.

In conjunction with the motion *in limine* to exclude Dr. Vance's opinions, GE moved for summary judgment. It claimed that the plaintiff had failed to provide any evidence establishing that GE products to which the plaintiff was allegedly exposed actually contained asbestos. The court agreed and granted the motion, noting that the plaintiff's "casual reference" to asbestos wiring "is not proof of asbestos." The court further determined that there was insufficient evidence that the plaintiff worked in regular proximity to GE products – a requirement to establish causation under Maryland substantive law. As such, the plaintiff's claims against GE failed as a matter of law.

Read the full decision here.

Court of Appeals of Ohio Finds Reversible Error in Refusal of Daubert Hearing On Basis of Opinions of Drs. Strauchen and Frank

(Court of Appeals of Ohio, Eighth Appellate District, Cuyahoga County, May 5, 2016)

In this case it is alleged that the decedent, Glenn Watkins, was exposed to chrysotile asbestos dust from the sanding of Bendix brakes while working as a manager at various Auto Shack and AutoZone retail stores between 1985 and 2006 and that this exposure was a substantial cause of his pleural mesothelioma and death. Prior to trial, all defendants other than Honeywell International Inc. settled or were dismissed. The issue at trial was whether Watkins' handling of Bendix brakes was a cause-in-fact of his mesothelioma, and, if so, by how much. Watkins' two causation experts, Drs. James A. Strauchen and Arthur L. Frank shared the opinion that his exposure to Bendix brakes was a substantial cause of his mesothelioma.

Prior to trial, Honeywell moved in limine to exclude Drs. Frank and Strauchen from testifying or, in the alternative, requested a Daubert hearing to examine the reliability of their opinions. Honeywell argued the experts' opinions were not based on reliable science because their "every exposure" and "cumulative dose" theories are not based on scientifically defensible principles and methodologies. The trial court denied the motions without a Daubert hearing and the plaintiff's experts testified accordingly at trial. The jury returned a verdict in favor of the plaintiff. Honeywell appealed arguing, among several issues, that the trial court committed reversible error by permitting the plaintiff's causation experts to testify, over the defendant's objections in limine renewed during trial, that (1) each or every exposure of asbestos is a substantial contributing cause of pleural mesothelioma; (2) if a person develops mesothelioma and there is evidence of any asbestos exposure from a product (regardless of fiber or dose), then the disease was caused by asbestos from the identified products; and that (3) the plaintiff's mesothelioma was caused by exposure to brake dust.

The Court of Appeals agreed with Honeywell that the testimony of Drs. Strauchen and Frank did not comply with either Ohio Rule of Evidence 702 or the Daubert standard for the admissibility of expert evidence and reversed the trial court's judgment. The court explained that the trial court has a role as an evidentiary gatekeeper, and must "analyze not what the experts say, but what basis they had for saying it." The Court of Appeals stated that because the trial court did not hold a Daubert hearing, it could not independently determine whether Drs. Frank's and Strauchen's causation theories were supported by sufficient data or based on reliable principles and methods. The court offered, by way of example, that "the record contains some epidemiological studies, but there is no evidence about how these studies were conducted. Were there any biases in the selection of studied subjects? Were there any systematic errors in measuring data that resulted in differential accuracy of information? Who funded the studies? There are numerous questions the court could ask the experts regarding the reliability of these studies. The court must consider biases when interpreting an epidemiological study."

The court concluded that "in the absence of a hearing, the trial court did not have sufficient evidence upon which to analyze the basis for Watkins' experts' opinion. The trial court did not properly execute its duty as gatekeeper because, without a hearing, the court could not independently examine and evaluate the reliability of Drs. Frank's and Strauchen's expert testimony. Therefore, their testimony was admitted in error."

Read the full decision here.

Citing New York Case Law, Court Denies Crane Co.'s Motion in Limine to Preclude 'Each and Every Exposure' Opinion

(Supreme Court of New York, New York County, April 21, 2016)

This opinion addressed potential causation testimony offered by the plaintiffs in two cases. In one case, the plaintiff's decedent died of mesothelioma prior to being deposed. The decedent's nephew and co-worker testified during deposition that his uncle was exposed to asbestos while working as a sheet metal worker at shipyards, and while installing furnaces, from the 1960s-70s. His testimony included exposure to insulation, packing, gaskets, and pipe covering used in connection with Crane valves. In the second case, the decedent, a career Navy man, died of mesothelioma and his shipmate testified regarding asbestos insulation and gaskets used with Crane valves on the USS Noa. The plaintiffs' counsel retained Dr. Strauchen, who concluded that cumulative exposures to asbestos from Crane valves were a substantial contributing factor in causing both mesotheliomas. The plaintiffs also retained Dr. Steven Markowitz to testify that exposure to chrysotile asbestos was capable of causing mesothelioma.

Defendant Crane Co. moved in limine for an order precluding the plaintiffs from offering the "each and every exposure" opinion, rather than providing scientific assessments of specific doses of asbestos. In the alternative, Crane requested a Frye hearing to evaluate the foundation of causation testimony offered by the plaintiffs' experts. The court denied both requests.

The court stated: "New York law requires that 'an opinion on causation should set forth a plaintiff's exposure to a toxin, that the toxin is capable of causing the particular illness (general causation), and that plaintiff was exposed to sufficient levels of the toxin to cause the illness (specific causation) (citations omitted).'" New York case law has held that "so long as plaintiffs' experts have provided a scientific expression of plaintiffs' exposure levels, they will have laid an adequate foundation for their opinions on specific causation." Further, the link between asbestos and disease that provided a basis for general causation has been well documented. The court was not persuaded by Crane's arguments because case law acknowledged that often a plaintiff's exposure to a toxin will be difficult or impossible to quantify. Things such as intensity of exposure may be more important than the cumulative dose, and the plaintiff's work history can be used to estimate exposure. Crane furnished no basis for why the same could not be done in these cases.

Read the full decision here.

Regardless of Whether New York or Maritime Law Applied, Government Contractor and Bare Metal Defenses Insufficient to Grant Summary Judgment to Foster Wheeler

(U.S. District Court for the Northern District of New York, March 21, 2016)

The plaintiff alleged the decedent was exposed to asbestos while serving in the Navy from 1947-52, and while on board the *USS Charles H. Roan*. Defendants Foster Wheeler and General Electric removed to federal court pursuant to the federal officer statute. Foster Wheeler moved for summary judgment based on: (1) the government contractor defense; (2) bare metal defense; and (3) its products were not a substantial factor in causing injury. Crane Co. also moved for summary judgment; Crane, CBS Corp., and Foster Wheeler also filed motions in limine to preclude the testimony of the plaintiffs' expert, Dr. Steven Markowitz. The court denied the summary judgment of Foster Wheeler The decedent provided deposition testimony over the course of five days. While on board the *USS Roan*, he worked the valves controlling the amount of water going to the boilers, and also lit and cleaned the burners. The court provided a lengthy summary of decedent's testimony. Pursuant to a naval contract, Foster Wheeler furnished four Babcock and Wilcox boilers for the ship. The plaintiffs argued Foster Wheeler supplied asbestos gaskets, rope, and tape for use in the boiler and the plaintiff's naval expert, Captain Moore, testified that the decedent was exposed to asbestos from replacement gaskets.

Drawings showed that Crane valves were present where the decedent worked, including on the Foster Wheeler boilers. The plaintiff argued that Crane specified the use of asbestos in boiler check valves; Crane argued the drawings relied upon by the plaintiff were made to comply with Navy specifications, not Crane specifications. The court applied maritime law to the plaintiff's claims. First, Foster Wheeler argued it was entitled to summary judgment pursuant to the government contractor defense, which protects independent contractors from tort liability associated with their performance of government contracts. In this case, for this defense to apply, Foster Wheeler must show that its failure to warn resulted from a discretionary decision by the Navy; Foster Wheeler cannot generally

claim the Navy had control over the project. Foster Wheeler's conclusory statements that the Navy required it to provide boilers were insufficient to create a question of fact.

Second, Foster Wheeler argued it was entitled to summary judgment due to the bare metal defense, where defendants can only be held liable for component parts that it manufactured or distributed. Crane also argued it was not legally responsible for asbestos-containing materials it did not place into the stream of commerce. The court carefully examined the evidence in the record, and conflicting case law. The court stated: "This Court will follow that middle path. In general, consistent with the bare metal defense, a manufacturer is not liable for materials it did not supply. But a duty may attach where the defendant manufactured a product that, by necessity, contained asbestos components, where the asbestos-containing material was essential to the proper functioning of the defendant's product, and where the asbestos-containing material would necessarily be replaced by other asbestos-containing material, whether supplied by the original manufacturer or someone else." In this case, the record contained sufficient evidence for a jury to conclude that defendants' products required asbestos in order to function; on these facts, a duty to warn could attach, and summary judgment was denied. Further, even if the court analyzed this case under New York law, the result would be the same.

Third, Foster Wheeler argued its products were not a substantial factor in the decedent's injury. Here, questions of fact prevented the court from granting summary judgment on this ground, and the court examined the opinions of the plaintiff's expert Dr. Markowitz in so finding.

Finally, the court denied the defendants' motions in limine to exclude Dr. Markowitz, on various grounds.

Read the full decision here.

California Appellate Court Allows Expert Opinion Testimony on "Every Exposure" Theory

(Court of Appeal of California, Second Appellate District, March 3, 2016)

The plaintiff presented expert testimonial evidence at trial that her father's exposure to asbestos from Bendix brake linings was a substantial factor in contributing to his risk of developing mesothelioma. The jury found in favor of the plaintiff; defendant Honeywell International appealed on two grounds: (1) the "every exposure" theory should have been excluded under California law, and (2) the trial court erred in refusing to give a supplemental jury instruction regarding factors relevant to the substantial factor determination. The court found no error.

For approximately 15 years, the decedent did one or two brake jobs per day, and two or three home remodeling projects per month with drywall and tile. Before trial, Honeywell filed motions in limine to preclude the plaintiff from presenting expert testimony that every exposure to asbestos above background levels contributed to mesothelioma; this motion was denied and the court allowed Dr. James Strauchen, pathologist, to testify.

On appeal, Honeywell argued that this opinion was: (1) speculative and illogical; (2) the regulatory standards he relied upon could not establish causation; (3) no appropriate scientific literature supported this theory and epidemiological studies contradicted it; and (4) the theory was contrary to California causation law. The court addressed each argument: (1) it is not illogical to conclude that each exposure, when added to other exposures, could result in a cumulative exposure above background levels; (2) Dr. Strauchen did not rely on regulatory standards to develop his opinion because he did his own research; (3) Dr. Strauchan did not admit there were no low dose studies, and in fact low dose studies did exist; and (4) California law did not require a dose level estimation, but a determination to a reasonable medical probability that the exposure was a substantial factor. Although other jurisdictions have rejected this theory, California had different standards from other jurisdictions. The court stated: "Finally, we simply disagree with courts in other jurisdictions that conclude the 'every exposure' theory cannot be reconciled with the fact that mesothelioma and other asbestos-related diseases are dose dependent."

Lastly, there was no error in refusing to give Honeywell's proposed jury instruction on causation; California law did not require the causation factors listed by Honeywell in the proposed instruction.

Read the full decision here.

Mixed Rulings on Daubert Challenges and Motions for Summary Judgment by Employer on Employees' Non-Occupational Asbestos Exposure Claims

(U.S. District Court for the Western District of Wisconsin, February 19, 2016)

In this decision, there were eight separate actions against Weyerhaeuser Company involving private and public nuisance claims brought by, or on the behalf of, former employees of Weyerhaeuser for asbestos-related injuries based on non-occupational exposure. Weyerhaeuser used asbestos in its mineral core plant to manufacture a door core. The plaintiffs non-occupational exposure claims were based on their living, or being, in close proximity to the plant. Weyerhaeuser "moved to strike plaintiffs' experts and for summary judgment, arguing that plaintiffs are unable to prove injuries beyond those resulting from asbestos exposure on the job, for which they, their estates and spouses may only recover under worker's compensation laws."

In a mixed ruling, the court held: "For the reasons that follow, the court will grant defendant's Daubert and summary judgment motions with respect to plaintiffs Masephol, Prust, Seehafer, Heckel and Treutel, based on their failure to offer reliable evidence of significant, non-occupational exposure to asbestos. The court will, however, deny the same motions with respect to plaintiffs Boyer, Pecher and Sydow, finding that the latter three plaintiffs have produced sufficient evidence for a reasonable jury to find: (1) they not only worked, but lived for at least one year within a 1.25 mile radius of the plant that scientific studies suggest may meaningfully increase their risk of development mesothelioma; and (2) a qualified expert can testify reliably that this exposure constituted a significant, non-occupational asbestos exposure, which in turn substantially contributed to their respective mesothelioma diagnoses. The court will also grant defendant's motion for summary judgment on plaintiff's private nuisance claims, finding: (1) plaintiffs failed to put forth any evidence of a possessory interest; and (2) the discovery rule under Wis. Stat. § 893.52 does not apply. In all other respects, defendant's motions will be denied." Plaintiffs Boyer, Pecher and Sydow were allowed to proceed to trial on the public nuisance claims.

Read the full decision here.

Expert Opinion on Asbestos Content of Insulation — Based in Part on Non-Party Witness Declaration — Sufficient to Create Question of Fact to Overcome Summary Judgment

(Court of Appeal of California, First Appellate District, Division One, February 18, 2016)

In this case, it was claimed that the decedent, Michael O'Leary, was exposed to asbestos while working as a rigger at the Tosco Refinery in the 1970s to late 1980s near employees from the defendant, Dillingham Construction N.A., Inc., who were sweeping up insulation off the floor in his vicinity. The trial court precluded the opinion that the insulation contained asbestos as being speculative from the plaintiff's expert, Charles Ay, and granted summary judgment to Dillingham.

On appeal, the court found the expert's opinion to not be speculative and reversed the lower court's ruling. As the court held: "The expert opinion of Charles Ay regarding the insulation's asbestos content is not speculative or lacking in foundation as Dillingham claims. Ay had an eyewitness's description of the insulation. Ay also knew the insulation was removed from steam pipes and machinery over a span of years beginning in the early 1970's. From these facts, and based on his knowledge of insulation materials used in various industrial contexts, including in refineries, Ay concluded the insulation contained asbestos."

Read the full decision here.

Daubert Challenge of Plaintiff's Experts Denied in Career Boilermaker Case

(U.S. District Court for the Southern District of California, February 16, 2016)

The plaintiff in this case alleged that the decedent, Michael Walashek, was exposed to asbestos from various products while working as a boilermaker between 1967 and 1986 on various naval, commercial, and industrial vessels. The defendant, Foster Wheeler LLC, filed a motion to preclude the testimony of the plaintiff's experts Dr. Edwin Holstein ad Dr. Michael Claude Fishbein on the grounds that their opinions do not satisfy the requirements of *Fed. R. Evid. 702* and *Daubert*.

The court denied the motion. Regarding Dr. Fishbein, the court held: “Dr. Fishbein’s diagnosis of mesothelioma is clearly relevant and is also based on scientifically valid methodology. Therefore, his expert opinion is admissible.” Regarding Dr. Holstein, the court held: “Dr. Holstein utilized scientifically valid methods in reaching his conclusion that Walashek’s exposure to asbestos attributable to Foster Wheeler was ‘significant’ and was a ‘substantial contributing factor’ to Walashek’s mesothelioma. Dr. Holstein’s conclusion rests upon, among other things, the dose-response relationship between asbestos and mesothelioma, which has been established by scientific and medical literature, facts regarding the sort of work and duration of the work that Walashek performed, and industrial hygiene data.” The court further stated that “Dr. Holstein’s failure to engage in a comparative analysis of Walashek’s claimed exposures does not render his opinion unreliable. Therefore, the Court denies Foster Wheeler’s motion to exclude the testimony of Dr. Holstein.”

Read the full decision here.

Federal Officer Jurisdiction Decisions

Broad Interpretation of the Federal Officer Removal Statute Keeps Case Against Boeing in Federal Court

(U.S. Court of Appeals for the Third Circuit, November 22, 2016)

The plaintiff filed a failure-to-warn product liability suit against, among others, The Boeing Company, after his wife Mary became ill from alleged secondary asbestos exposure. Boeing removed to federal court based upon the federal officer removal statute. The district court remanded, and the appellate court reversed.

The plaintiff alleged Mary suffered take home asbestos exposure through laundering the clothes of her first husband Robert Keck. While working for New Brunswick Plating Co. in the late 1970s, Keck sandblasted the landing gear of World War II planes. Mary testified these planes were C-47 planes, which were made by the Douglas Aircraft Company, a predecessor to Boeing.

Boeing argued that the C-47 was produced for, and under the supervision of, the U.S. military, thus entitling it to the federal defense of government contractor immunity. Boeing also argued this oversight extended to labels and warnings for all parts of the aircraft, and provided affidavits in support. In ruling on the plaintiff’s motion to remand, the district court held that Boeing had a special burden to demonstrate that it was acting under the control of the government, because it was a contractor and not a federal officer. As such Boeing must show that a federal officer directly prohibited Boeing from warning third parties of the risks associated with asbestos, which Boeing failed to do.

On appeal, the appellate court noted that the federal officer removal statute has existed for 200 years; further, the statute itself was a break with tradition because it allowed the defendants to remove to federal court based upon something other than diversity or federal question jurisdiction. Unlike the general removal statute, the federal officer removal statute was to be broadly construed. Four requirements must be met to properly remove a case based upon this statue: (1) the defendant is a “person” within the meaning of the statute; (2) the plaintiff’s claims are based upon the defendant’s conduct “acting under” the United States, its agencies, or its officers; (3) the plaintiff’s claims against defendant are “for, or relating to” an act under color of federal office; and (4) the defendant raises a colorable federal defense to the plaintiff’s claims. The court analyzed each requirement in turn to find that all four were satisfied. Regarding the “acting under” requirement, this was to be liberally construed. “Thus, the proposition that contractors bear some additional ‘special burden’ is inconsistent with both precedent and the underlying objectives of the removal statute.” Further, the court has explicitly rejected the notion that defendants only act under a federal officer if the complained-of conduct was done at the specific request of the federal officer. Taking the undisputed facts from the notice of removal as true, Boeing stated sufficient facts to establish a colorable defense.

Read the full decision here.

Federal Court Denies Remand on Outer Continental Shelf Lands Act Jurisdiction and Dismisses Fraud Counts of Complaint

(U.S. District Court for Eastern District Of Louisiana, November 17, 2016)

The U.S. District Court for the Eastern District of Louisiana issued two opinions in the matter of *Sheppard v. Liberty Mut. Ins. Co., et al*. which denied the plaintiffs' motion to remand and dismissed the plaintiffs' fraud cause of action against the defendants.

Plaintiff Jesse Frank Sheppard originally filed in the Civil District Court for the Parish of Orleans. Sheppard alleged that he developed lung cancer and/or mesothelioma as a result of exposure to asbestos while working for Freeport Sulphur Company. The plaintiff sued several defendants involved in the manufacture, distribution, and sale of asbestos-containing products that he allegedly worked with as well as claims against insurance companies that allegedly provided coverage to defendants for asbestos-related claims and withheld information about the danger of asbestos.

Defendant Mosaic Global Holdings removed the case and the plaintiff moved to remand to state court. Defendant Mosaic and other opposed the motion to remand and assert that the Court may exercise jurisdiction under the Outer Continental Shelf Lands Act (OCSLA). Defendants argued that the court may exercise jurisdiction based on Sheppard's allegation that a portion of his asbestos exposure occurred at Freeport's Caminada Facility, which is located on the Outer Continental Shelf (OCS).

OCSLA contains an independent grant of federal jurisdiction. The pertinent provision, 43 U.S.C § 1349(b)(1), states: "[T]he district courts of the United States shall have jurisdiction of cases and controversies arising out of, or in connection with . . . any operation conducted on the outer Continental Shelf which involves exploration, development, or production of the minerals, of the subsoil and seabed of the outer Continental Shelf, or which involves rights to such minerals . . . ." The court explained that under Fifth Circuit precedent, a district court has jurisdiction under OCSLA if "(1) the facts underlying the complaint occurred on the proper situs; (2) the plaintiff's employment furthered mineral development on the OCS; and (3) the plaintiff's injury would not have occurred but for his employment." The plaintiff argued that (1) removal is inappropriate because at various times in his complaint he alleges that his injury was caused by exposure from 1967 to 1976, rather than through 1994; (2) new evidence suggests that Sheppard was not, in fact, exposed to asbestos at the Caminada Facility; and (3) even if Sheppard was exposed at Caminada, that exposure was not a "but-for" cause of his injury because the bulk of Sheppard's alleged exposure occurred at other Freeport facilities not on the OCS.

The court rejected the plaintiff's argument regarding timing because the complaint plainly alleged that Plaintiff was exposed while working at the facility. The court rejected the plaintiff's second argument because it found that the new evidence did not suggest he was not exposed at the facility. The plaintiff's "new evidence" was the plaintiff's own deposition testimony, which the court found insufficient to overcome the clear allegations in his pleadings that a portion of his exposure occurred at Caminada. The court also rejected the plaintiff's causation argument. The plaintiff argued that because he had decades-long daily exposure to asbestos that the roughly two years of exposure at Caminada cannot be a but for cause of his illness. The court rejected that position, explaining that "given that the but-for test would not excuse Freeport from liability for its OCS-based actions, it makes little sent to apply the same test to deny Freeport OCSLA jurisdiction" because "when a plaintiff is subjected to multiple tortious events and each is independently sufficient to cause plaintiff's injury the but-for causation test will not work to excuse any single causative factor."

The court issued a separate opinion granting defendant Mosaic Global Holdings Inc.'s motion to dismiss the plaintiff's fraud claims under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Federal Rule of Civil Procedure 9(b) imposes a heightened pleading requirement for fraud claims. Under Rule 9(b), a party alleging fraud or mistake "must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). The Fifth Circuit "interprets Rule 9(b) strictly, requiring the plaintiff to specify the statements contended to be fraudulent, identify the speaker, state when and where the statements were made, and explain why the statements were fraudulent." The court explained that state-law fraud claims, such as those alleged by the plaintiff in this case, are subject to the pleading requirements of Rule 9(b).

The fraud claims made by the plaintiff were of a concealment nature, and the court offered that while it is difficult to plead fraud by silence with particularity, it does not "excuse Plaintiffs alleging such fraud from the requirements of Rule 9(b). Therefore, to plead a claim for fraudulent concealment, the plaintiff must specifically allege: (1) the information that was withheld, (2) the general time period during which the fraudulent conduct occurred, (3) the relationship giving rise to the duty to speak, and (4) what the person or entity engaged in the fraudulent conduct gained by withholding the information."

Critically, the court explained that "group pleading" is impermissible. In other words, claims for fraudulent concealment will therefore be dismissed if any one of the four required elements is pled generally as to all defendants, rather than specifically as to a single defendant. The court found that the plaintiff failed to plead what individual defendants gained by withholding information about the danger of asbestos and therefore the complaint failed to meet the fourth requirement for specifically alleging fraud under Rule 9(b). The court, recognizing that the plaintiff's failure may reflect mere pleading defect rather than a more fundamental problem with the claims, dismissed the claims without prejudice and with leave to amend within 21 days.

Read the first decision here. | Read the second decision here.

Denial of Administrative Dismissal Turns on Definition of a "Smoker" Under Ohio State Code

(Court of Appeals of Ohio, Eighth Appellate District, November 17, 2016)

Plaintiff Bobby Turner and his wife commenced an action in April 2013 alleging asbestos exposure caused his lung cancer. The plaintiff was a drywall finisher from 1962 to 1978. Defendant Union Carbide moved to administratively dismiss the claim in February 2014, claiming that the plaintiffs failed to submit prima facie evidence pursuant to R.C. 2307.92. (Under Ohio's Revised Code General Provisions a plaintiff must meet minimum medical requirements for tort actions alleging an asbestos claim). In response, the plaintiffs submitted an affidavit saying that Mr. Turner was a non-smoker since 1957 and attached is medical records in support. Based on the affidavit, Union withdrew its motion. Two weeks prior to trial, Union renewed its motion. Union argued that based on recently obtained medical records and deposition testimony Mr. Turner is a smoker as defined under R.C. 2307.91(DD) and therefore failed to meet the minimum medical requirements for an action alleging asbestos exposure. The plaintiffs opposed and argued that the occasional use of a cigar doe s not qualify Mr. Turner as a "smoker" under R.C. 2307.91. The court denied Union's motion. It noted there was conflicting testimony, but the majority of the notations in the medical records support Mr. Turner's argument of no recent smoking history. Union appealed.

On appeal, Union argued that the court applied the wrong standard. It was Union's position that the court should not have weighed the evidence in making its decision since under R.C. 2307.91 (DD) when there is evidence that a person has smoked in the past 15 years, the plaintiff has the burden, through a written report of a "competent medical authority," to prove that he is not a smoker as defined by the Code. On review, the appellate court analyzed who is considered a "smoker" under the definition in the Code and held "the record establishes that the trial court had competent, credible evidence before it to support its decision finding Turner to be a nonsmoker. The trial court's decision was not against the manifest weight of the evidence. Union Carbide's assignment of error is overruled."

Read the full decision here.

Government Contractor Defense Applied to Crane Such That Motion to Remand to State Court Denied

(U.S. District Court for the District of Maryland, September 29, 2016)

The decedent's family filed a complaint in state court, which was removed to federal court by Crane Co. based upon the federal officer defense. The plaintiffs filed a motion to remand or, in the alternative, to sever all claims other than those against Crane and to remand all other claims. The motion to remand was denied.

The decedent served in the Navy from 1952-56, and was then employed at Bethlehem Steel Sparrows Point Shipyard from 1956-59; from 1959-63, the decedent worked as a laborer at Eastern Stainless Steel. He died from mesothelioma and was allegedly exposed to Crane products while working aboard a Navy vessel.

The federal officer defense, or the government contractor defense when applied to contractors that supply goods to the federal government, states that "Liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States." This defense applied to both design defects and failure to warn claims. To justify removal to federal court, the defense must be colorable, and the removing defendant must establish a causal connection between the allegedly wrongful conduct and asserted official authority.

Crane filed affidavits stating that Crane made and supplied equipment for use on Navy vessels, which was governed by extensive federal standards and specifications. The court found that Crane submitted ample support for its proposition that the Navy exercised strict control.

The plaintiffs argued this defense was not established because Crane provided no evidence supporting its allegation that the decedent was exposed to Crane products while serving in the Navy at a jobsite where the products were used, and that the products were under complete and direct control of the federal government. However, the court stated: "Given the dearth of specific allegations in Plaintiffs' complaint regarding any specific product of any particular Defendant, the Court cannot fault Crane Co. for not providing the kind of specificity desired by Plaintiffs. Crane Co. is clearly anticipating that the course of discovery may flesh out what are now, at best, Plaintiffs' conclusional allegations."

Although the plaintiffs disclaimed any cause of action that could give rise to federal jurisdiction, the plaintiffs cited no authority allowing such language to bar the federal officer defense where it was otherwise applicable.
The plaintiffs' motion to sever was likewise denied, since the plaintiffs provided no supporting argument. Further, the presence of cross-claims by all defendants, including Crane, made severance antithetical to judicial economy.

Read the full decision here.

Case Remanded to State Court as Defendants Could Not Use the Federal Officer Removal Statute Where the Plaintiff Expressly Disclaimed Any Naval Asbestos Exposure

(U.S. District Court for the Southern District of Florida, May 6, 2016)

Plaintiff Richard Batchelor, a former employee of Florida Power & Light Company who was diagnosed with terminal mesothelioma after he was exposed to and inhaled asbestos fibers from asbestos-containing products manufactured, sold, supplied, distributed, or controlled, by the defendants, sued in the Circuit Court for the 11th Judicial District in and for Miami-Dade County Florida alleging three causes of action; (i) negligence; (ii) strict liability; and (iii) loss of consortium. Following Batchelor's deposition, during which he testified that he served in the U.S. Navy and, as part of his service, worked a reactor operator on the U.S.S. Gato, a nuclear submarine and responsible for replacing control panels and supervising turbine repairs in shipyards, defendant CBS Corporation/Westinghouse (CBS) removed the action to federal court based pursuant to the federal officer removal statute, 28 U.S.C. § 1442(a)(1). To successfully remove an action pursuant to the statute, "[a] defendant 'must advance a…colorable defense arising out of [his] duty to enforce federal law[.]" *Magnin v. Teledyne Cont'l Motors*, 91 F.3d 1424, 1427 (11th Cir. 1996). CBS thus alleged the existence of a colorable defense arising from the plaintiff's work on the U.S.S. Gato. The plaintiff's subsequently filed a motion to remand their action to state court.

The U.S. District Court for the Southern District of Florida granted the plaintiffs' motion to remand. In support of its doing so, the District Court noted that the plaintiffs had expressly disclaimed any attempt to recover for asbestos exposure based upon his four-year service on the U.S.S. Gato and cited that the supporting evidence, such as the complaint and exposure sheets, did not even reference Batchelor's time in the Navy, nonetheless any asbestos exposure during same. The District Court thus found that CBS could not raise a colorable federal defense based upon government contractor immunity to the plaintiffs' claims since its "sole basis for remove is its contention that Plaintiff was exposed to asbestos while aboard the U.S.S. Gato, which is not at issue in this case[]" and thus, that the basis for removal pertained "to claims that simply do not exist." Accordingly, the case was remanded to the 11th Judicial Circuit in and for Miami-Dade County, Florida pursuant to 28 U.S.C. § 1447(c) due to lack of subject matter jurisdiction.

Read the full decision here.

Fourth Circuit Upholds Summary Judgment on Substantial Factor Causation and Affirms Denial of Remand Based on Federal Officer Jurisdiction

(U.S. Court of Appeals for the Fourth Circuit, May 6, 2016)

The U.S. Court of Appeals for the Fourth Circuit issued an opinion in two consolidated appeals upholding the granting of summary judgment to defendants CBS Corporation, General Electric Corporation (GE), MCIC (local insulation contractor), Paramount Packing & Rubber Company, Phelps Packing & Rubber Company, SB Decking, Inc., Wallace & Gale Asbestos Settlement Trust (local insulation contractor), and Foster-Wheeler Energy Corporation. The two consolidated cases involved alleged exposures to dust asbestos-containing products manufactured, supplied, or installed by the defendants at Baltimore, Maryland area shipyards.

On appeal, the appellants argued that the U.S. District Court for Maryland applied the incorrect legal standard to determine whether, under Maryland law, the appellants' injuries were proximately caused by the Appellees' asbestos containing products. Appellants position was that the longstanding "frequency, regularity, and proximity" test laid out in *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156, 1162-63 (4th Cir. 1986) (subsequently adopted by Maryland Courts, and repeatedly reaffirmed by the Maryland Court of Appeals for over the last twenty years) was inapplicable in cases of direct-rather than circumstantial-evidence cases. The court rejected this argument, noting that this same argument was previously rejected by the Maryland Court of Appeals.

The Fourth Circuit also rejected the appellants argument that even under the "frequency, regularity, and proximity" test that there was sufficient exposure to the Appellees' asbestos-containing products to survive summary judgment. The Fourth Circuit disagreed stating that "our review of the record convinces us that Appellants did not make a sufficient showing of exposure to survive summary judgment."

Finally, the Fourth Circuit affirmed the District Court's denial of the motion to remand for lack of federal-officer jurisdiction. The court explained that "we conclude that GE satisfied all three requirements for federal-officer removal" because 1) GE is a "person acting under" a federal officer because it was acting under a valid government contract at all times relevant to the litigation; 2) GE raised a colorable federal defense to Appellants' claims, namely, that GE was protected as a government contractor; and 3) GE established a causal connection between the charged conduct and its asserted official authority — Appellants charge GE with negligence and failure to warn related to GE's production and installation of turbines and generators, done pursuant to contracts with the Navy.

Read the full decision here.

Case Remanded Where GE Failed to Satisfy Requirements of Federal Officer Removal Due to Plaintiff's Specific Disclaimer of No Naval Asbestos Exposure

(U.S. District Court for the Southern District of West Virginia, Charleston Division, April 29, 2016)

In this case, the plaintiff claimed that he was exposed to asbestos and contracted mesothelioma from products allegedly manufactured, supplied, installed, and/or distributed by numerous defendants. The plaintiff asserted in the complaint that he served in the U.S. Navy from 1962–66 but provided the disclaimer that the "[p]laintiff was not exposed to asbestos and is not bringing any claim for exposure to asbestos-containing products during Plaintiff's service in the Navy."

One of the defendants, General Electric Company (GE), removed the case to the U.S. District Court for the Southern District of West Virginia pursuant to 28 U.S.C. § 1442(a)(1) on the basis that it had government contractor immunity for liability for injuries that may have resulted from the plaintiff's asbestos exposure from turbines, generators and other equipment on U.S. Navy vessels — to the extent that GE constructed or repaired them. The plaintiff subsequently filed a motion to remand, arguing that GE asserted a "non-existent claim" given the plaintiff's disclaimer related to his service in the Navy.

The court determined that a remand was appropriate because "federal officer removal must be predicated on the allegation of a colorable federal defense." Although certain federal courts have found that disclaimers did not defeat removal where the disclaimers generally purported to waive federal claims, "federal courts have consistently granted motions to remand where the plaintiff expressly disclaimed the claims upon which federal officer removal was based." The court explained that, in this case, the plaintiff disclaimed all of his claims arising out of his potential exposure while in the Navy, and GE did not assert that the plaintiff was exposed to any products GE provided to the Navy

outside of the time period covered by the disclaimer. Accordingly, GE failed to satisfy the requirements for federal officer removal under 28 U.S.C. § 1442(a)(1).

Read the full decision here.

Defendant's Failure to Warn Boilermaker Employees in the Shipyard Itself Prohibited Federal Contractor Defense

(U.S. District Court for the District of Maryland, April 20, 2016)

The decedent in this case died of mesothelioma and his representatives filed an action in state court. Defendant Foster Wheeler removed this case to federal court under the officer removal statute. The plaintiff moved to remand, which the court granted.

The plaintiffs alleged exposure during the decedent's work at Bethlehem Steel Sparrows Point Shipyard, while working as a boiler maker from 1948-1970s. Foster Wheeler removed on the basis that it was acting under an officer or agency of the United States, because it made boilers for Naval ships pursuant to naval specifications. The plaintiffs argued the removal was untimely, and Foster Wheeler failed to meet the requirements for a federal officer. The plaintiffs claimed the boilers were made in the shipyard under the direction of Foster Wheeler, and were only installed on the ships after they were made. Further, the plaintiffs argued the Navy did not restrict Foster Wheeler's ability to warn its employees in the shipyard.

The court assumed the removal was timely but remanded due to lack of jurisdiction. To invoke the federal contractor defense against a failure-to-warn products liability claim, defendants must show: (1) the government exercised discretion and approved certain warnings for products; (2) warnings provided by the contractor conformed to federal specifications, and (3) contractors warned the government about dangers known to the contractor but not to the government. Foster Wheeler provided two affidavits to support its argument that the Navy provided Foster Wheeler with precise specifications, including all warnings related to the boilers. However, no evidence was provided to show the Navy exercised any discretion over Foster Wheeler's ability to warn its workers in the shipyard. The court stated: "The Navy could not have been exercising its discretion where, as here, there is no evidence that it considered warnings during Foster Wheeler's manufacturing process. Because Foster Wheeler did not suggest warnings to the government, it is impossible that warnings in the shipyard's boiler shop were 'considered by a Government officer, and not merely by the contractor itself.'" Therefore, Foster Wheeler did not establish a colorable federal defense. Further, since no federal officer provided any direction regarding whether to warn workers in Foster Wheeler's boiler shop, Foster Wheeler did not establish a causal nexus between their actions and the plaintiffs' claims sufficient to satisfy the requirements of this defense.

Read the full decision here.

Federal Court of Appeals Remands Case for Determination of Colorable Federal Defenses Alleged by Shipyard

(U.S. District Court of Appeals for the Fifth Circuit, March 22, 2016)

In this case, the plaintiffs' decedent claimed exposure to asbestos containing thermal insulation while working at the Avondale Shipyard in Louisiana as laborer and painter from 1948-1996. The shipyard at issued worked on contracts for the federal government.

The defendants removed the case under federal officer removal and took the position that removal was proper since the government, through Navy inspectors, was involved in the building of the ships and had control of safety issues during construction. The plaintiffs, on the other hand, argued that removal was improper, as the government did not control the actual shipyard's safety department.

On appeal, from the U.S. District Court, the U.S. Court of Appeals for the Fifth Circuit analyzed federal removal on a three prong test. The court quickly dispensed of the first requirement and found the shipyard as a "person" within the meaning of the removal statute. The vourt noted the U.S. Supreme Court's prior recognition of corporate entities as being a "person" for purposes of the statute. The second prong of the test dealt with a factual analysis of whether the federal government was indeed directing the defendant's conduct which resulted in the plaintiff's specific injuries. The District Court concluded that no causal connection existed between the two elements of the first prong, and,

therefore, did not consider the third prong, whether or not the defendant had a colorable federal defense. The Appellate Court agreed with the District Court's finding that the requirement to use asbestos insulation did not exonerate the shipyard from liability for purposes of the plaintiffs' negligence claims. Relying on *Bartel v. Alcoa S.S. Co*., 805 F.3d 169 (5th Cir. 2015), the court found that even where the federal government had required the use of asbestos insulation, it had not prevented the shipyard from warning Plaintiff about the dangers of asbestos. The court, again relying on *Bartel*, stated that "the Navy neither imposed any special safety requirements on the shipyard nor prevented the shipyard from imposing its own safety procedures." At the heart of the plaintiffs' case was the claim that the defendant's alleged conduct was not within the direction or control of the federal government.

Read the full decision here.

FELA Decisions

Prior Release Found Inadequate to Dismiss Future Jones Act/FELA Claims Based on Development of Mesothelioma

(Supreme Court of New York, New York County, January 4, 2016)

In this NYCAL case, the Maritime Asbestos Legal Clinic originally filed a suit in 1997 on behalf of the decedent, Mason South, in the Northern District of Ohio. The decedent served in the Merchant Marines from 1945 to 1982. Less than two months later the case settled, with Texaco Inc. being one of the settled defendants. In 2014, the decedent was diagnosed with and died from complications related to mesothelioma. In 2015, the decedent's wife commenced another action under the Jones Act arising from her husband's life long career in the Merchant Marines. Texaco was named in the new action and moved to dismiss the case based on the release it was previously provided that specified that it was interpreted under the Jones Act and maritime law. The plaintiff opposed the motion based on the higher release standards of the Federal Employment Liability Act (FELA). Texaco argued that FELA does not apply, and even if it did the prior release was still enforceable.

The court denied Texaco's motion. In making its decision, the court noted that federal law applied as the release provided that it should be interpreted under the Jones Act and general maritime law. The court went on to state that the Jones Act incorporated the FELA statutes, however the issue was unsettled as to whether or not section 5 of FELA permits the release of future claims for known risks. Neither party addressed which federal circuit court, the Third or the Sixth, ruling on the issue should apply. Regardless, the court found: "Under the standards of either the Third or Sixth Circuit, Texaco has failed to meet its burden of proof to demonstrate that Mason South understood that he was releasing a future claim for mesothelioma, which was a risk known to him. If the Sixth Circuit applies, the release is void under Babbitt, 104 F3d 89, supra because a release must reflect 'a bargained-for settlement of a known claim for a specific injury, as contrasted with an attempt to extinguish potential future claims the employee might have arising from the injuries known or unknown by him.' If the Third Circuit's standard controls, summary judgment is also properly denied under Wicker, 142 F3d 690, supra. The Wicker court found that the release was void and contained a 'laundry list of diseases or hazards [which] the employee may attack as boiler plate.'"

In its decision, the court went on to explain: "Like the Wicker release, the South release refers to a release of future claims arising out of asbestos exposure, and like Wicker release the South release contemplates a second injury. However, unlike the Wicker release, the South release does not even mention cancer, and neither release mentions mesothelioma. Further, although the language of the release is strong evidence of the parties' intent, it is not conclusive. Texaco has offered no proof (other than the language of the release) to demonstrate that Mason South intended to release a future claim for mesothelioma." The court went on to conclude "while Texaco may have intended that the release bar this action, a release may not be "merely an engine by which an employer can evade FELA liability" (Wicker, 142 F3d at 700, supra)."

Read the full decision here.

Other FELA Decisions:

- **Damages**

    - **Court Upholds Verdict in FELA Matter in Face of Limitations Argument But Vacates Damages Award and Remands**
      (Appellate Court of Illinois, Fourth District, October 18, 2016)

Maritime/Admiralty Law Decisions

Plaintiffs' Dismissal with Prejudice of Claims Against Defendant Rendered Third-Party Demand for Contribution Void

(U.S. District Court for the Eastern District of Louisiana, November 18, 2016)

Third-party defendant Industrial Development Corporation of South Africa, Limited (IDC) filed a motion to dismiss defendant Cooper/T. Smith Stevedoring Company, Inc.'s (Cooper) third party complaint. The court granted IDC's motion and remanded the case to state court.

The plaintiffs filed suit on behalf of decedent Earl Lindsay, who died of lung cancer. The plaintiffs alleged the decedent worked as a longshoreman for several Cooper companies in the Port of New Orleans from 1954-1979, and during this time was exposed to asbestos. As against IDC, the plaintiffs asserted claims under the Jones Act; one day after filing suit the plaintiffs filed a motion to dismiss all claims against IDC with prejudice. Prior to the court ruling on this motion, Cooper filed a third-party demand seeking contribution and/or indemnification from IDC for any damages Cooper owed to the plaintiffs. On March 9, 2010, the court granted the plaintiffs' motion to dismiss its claims against IDC with prejudice. On March 11, an IDC representative received the third-party demand. On April 13, IDC removed the entire case to federal court on the basis of 28 U.S.C. Section 1441(d) and the Foreign Sovereign Immunities Act (FSIA), alleging it was an agency or instrumentality of South Africa. The court ordered IDC to file a motion to dismiss Cooper's third-party claims and Cooper filed a memorandum in opposition asking the court to convert IDC's motion into a motion for summary judgment.

First, although Cooper argued that IDC's motion was a summary judgment because it relied on matters outside the pleadings in the form of unpublished and unreported decisions attached to the motion, this argument was without merit. The court could take judicial notice of these decisions and therefore they were not outside the pleadings. Second, the court examined the motion to dismiss. IDC argued that the plaintiffs' dismissal with prejudice rendered Cooper's claims void under both Louisiana and maritime law. Although Cooper argued this rule did not apply to dismissals with prejudice, both the Fifth Circuit and Louisiana law held that it did. "Therefore, it is clear that under Louisiana law, plaintiffs' dismissal of claims against IDC with prejudice deprives Cooper of any right to contribution or indemnity. The same is true under general maritime law." The Supreme Court has held that the proportionate share approach should apply in maritime tort suits against joint tortfeasors; this rule has been extended to dismissals with prejudice.

Cooper also argued its claim for indemnity might be contractual; however, the third-party complaint made no mention of any contract between IDC and Cooper, or of a specific indemnity clause. Further, the dismissal of Cooper's claims against IDC did not harm Cooper's ability to defend itself.

Regarding remand, IDC's status as an agency or instrumentality of South Africa was the only basis for federal jurisdiction. The court weighed the factors to determine whether to exercise supplemental jurisdiction, and declined to do so. The remainder of the plaintiffs' state law claims were remanded back to the Parish of Orleans.

Read the full decision here.

Court Grants Summary Judgment for Defendant Boiler Manufacturer Based on Lack of Causation Under Maritime Law

(U.S. District Court for the District of Delaware, September 16, 2016)

Plaintiffs Jimmy R. Mitchell and Connie Mitchell filed suit alleging that Mr. Mitchell developed lung cancer as a result of exposure to asbestos-containing products, in part during the course of his employment as a boiler fireman with the U.S. Navy from 1976-79.

Defendant Foster Wheeler filed for summary judgment and argued, among other things, lack of causation. To establish causation under maritime law (which both parties agree applied), plaintiffs must show that (1) Mr. Mitchell was exposed to a Foster Wheeler boiler; (2) the exposure was a substantial factor in causing Mr. Mitchell's injury; and (3) Foster Wheeler manufactured or distributed the asbestos-containing product to which Mr. Mitchell alleges exposure.

In this case, Mr. Mitchell testified that the he performed maintenance on two Foster Wheeler boilers and the door gaskets attached to the same. He recalled the size of the boilers as approximately six to eight feet long from front to back, 100 feet from side to side, and two and a half stories tall. Despite recalling these specific details, Mr. Mitchell did not did not know if the external insulation he maintained was original to the Foster Wheeler boilers. He testified that the boilers would have been repaired and maintained prior to his arrival onboard the naval ship at issue. The door gaskets he maintained were not original either, as they were replaced every time the boiler door was opened. Mr. Mitchell's belief for his asbestos exposure came from when he replaced the insulation on the sludge drum opening every time the ship was in port. He thought that the insulation inside the doors was original to the Foster Wheeler boilers but the plaintiffs failed to cite to any evidence to support such an assertion.

The court ultimately concluded that the plaintiffs had done nothing more than show the presence of Foster Wheeler's boilers upon the naval ship. Further, the court noted that the plaintiffs' evidence was speculative as to whether the products to which Mr. Mitchell alleges exposure actually contained asbestos supplied or manufactured by Foster Wheeler. The court further noted the fact that the boiler components were so frequently maintained runs counter to the plaintiffs' assertion that they were original to the Foster Wheeler boilers. As such, summary judgment as to Foster Wheeler was granted based on lack of causation.

Read the full decision here.

Court Grants Summary Judgment After Plaintiff Fails to Establish Elements to Pierce the Corporate Veil

(U.S. District Court for the Southern District of New York, August 23, 2016)

The plaintiff, Kelan Unterberg, brought this action against multiple defendants for his alleged development of mesothelioma. His complaint lodged three separate causes of action including negligence under the Jones Act, breach of warranty of sea worthiness and reasonable fitness under U.S. Maritime law, and remedy of maintenance and cure. All of the counts were related to Unterberg's alleged exposure to asbestos aboard several civilian vessels while working as a chief engineer and merchant seaman from 1973-78.

The plaintiff, a citizen of Germany, first brought this action in Hawaii, and added Mobil Shipping Transportation Company (MOSAT), a Liberian Corporation owned by Exxon Mobil, at the end of discovery. Exxon Mobil moved to dismiss for lack of personal jurisdiction, arguing that it was never the plaintiff's employer and therefore his Jones Act claims could not be sustained. The plaintiff did not oppose Exxon Mobil's Motion to Dismiss. However, the plaintiff brought the action in New York that same day. The case was then removed to the U.S. District Court.

Defendant Exxon Mobil moved for summary judgment. The court's analysis began with the standard for summary judgment. Summary judgment shall be granted when there is no "genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." To survive summary judgment the non-moving party must show "hard evidence from which a reasonable inference in its favor may be drawn."

Exxon Mobil argued that the plaintiff's first and second counts should be dismissed because it was not Unterberg's employer under the definition of the Jones Act. The plaintiff countered with a charge that MOSAT was essentially the same business entity and the court should therefore pierce the corporate veil. The court recognized that the Second Circuit had found in the past that a subsidiary which is a "mere instrumentality" of the parent can be properly sued under the Jones Act. The Williams case set the stage for the elements necessary to pierce according to the court.

Those elements included a review of the following: 1) disregard of corporate formalities; 2) inadequate capitalization; 3) intermingling of funds; 4) overlap in ownership, officers, directors, and personnel; 5) common office space, address and telephone numbers of corporate entities; 6) the degree of discretion shown by the allegedly dominated corporation; 7) whether the dealings between the entities are at arm's length; 8) whether the corporations are treated as independent profit centers; 9) payment of guarantee of the corporation's debts by the dominating entity; and 10) intermingling of property between the entities. Moreover, not one "factor is dispositive." The plaintiff relied on Amoco International Oil Company, and argued that the facts were substantially similar in this matter. The plaintiff contended that the manager of the parent company also acted as one of the vice presidents and one of the directors of MOSAT from 1972-79. Additionally, the plaintiff argued that the defendant utilized the same shared office space. The court noted that the plaintiff established, at most, two of the factors. However, the remaining facts or evidence in this matter did not lend toward establishing any additional factors. Specifically, the court noted that the plaintiff had not established that the defendant was the owner of one of the vessels at issue.

Accordingly, the court granted Exxon Mobil's motion for summary judgment as to the claim for breach of seaworthiness.

Read the full decision here.

Maritime Law Applied in Granting of Summary Judgment to Manufacturer of Blowers Used on Naval Ship

(U.S. District Court for the District of Delaware, August 29, 2016)

The plaintiff sued several defendants alleging that he developed lung cancer as a result of exposure to asbestos products of the defendants while he served as a boiler tender in the U.S. Navy from 1976-79. Defendants Atwood and Morill (Atwood) and Carrier Corp. moved for summary judgment.

The court's analysis started with the standard for summary judgment. "The Court shall grant summary judgment if the movant shows there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." The burden falls on the moving party to establish the absence of a material fact in dispute. All parties agreed that maritime law was applicable. Under maritime law, a plaintiff must show that he was exposed to the defendant's product and the product was a substantial factor in causing the injury.

As for Atwood, the plaintiff did not respond with evidence refuting Atwood's motion for summary judgment. Accordingly, the court granted summary judgment in favor of Atwood.

As for Carrier Corp., the court quickly granted summary judgment. The court noted that Mitchell only associated asbestos with external insulation on Carrier blowers. Carrier Corp. had submitted an affidavit that it did not manufacture asbestos insulation. Further, Carrier did not require or recommend that its equipment be insulated with asbestos. Accordingly, summary judgment was appropriate.

Read the full decision here.

Magistrate Judge Recommends Various Rulings on Five Summary Judgment Motions Filed by Defendants

(U.S. District Court for the District of Delaware, August 19, 2016)

The United States Magistrate Judge recommended disposition on five summary judgment motions filed by various defendants in this mesothelioma case wherein plaintiffs alleged asbestos exposure during plaintiff Mark Hillyer's employment with the U.S. Navy from 1967-1997. The only product identification witness was plaintiff Mark Hillyer, who testified that he was exposed to asbestos through his maintenance work on reactor plant systems, steam plant systems, engines, and turbine generators. In deciding these motions, the court applied maritime law such that plaintiff must show that (1) he was exposed to defendants' product and (2) the product was a substantial factor in causing the injury he suffered. The plaintiffs alleged strict liability, negligence, and loss of consortium claims. The court recommended granting summary judgement for each defendant on the plaintiffs' punitive damages claims, and recommended various rulings regarding plaintiffs' other claims.
The summary judgment for Mine Safety Appliances Company (MSA), Copes-Vulcan, and Crane Co. were recommended to be granted in part and denied in part. The plaintiff associated MSA with steam suits, Copes with valves and Anchor and Garlock packing, and Crane with valves. MSA argued the plaintiffs could not prove the suit

was made by MSA, and if it was, any exposure was de minimus. However a genuine issue of material fact existed as to whether exposure to this suit was a substantial factor in causing the plaintiff's mesothelioma, and whether the suit was defective due to inadequate warnings or failure to warn. Further, whether the government contractor defense insulated MSA from liability was a question for the jury. The same rulings were recommended for Copes and Crane, because genuine issues of material fact existed as to substantial factor causation.

The summary judgement for Spirax Sarco and Air & Liquid Systems Corporation, successor in interest to Buffalo Pumps, were both recommended to be granted. The plaintiff testified there was a Sarco evaporator and steam trap on one ship he served upon, and worked on one Buffalo pump. The plaintiff provided no evidence that gaskets used on the steam trap were placed into the stream of commerce by Sarco, and even if they were, such exposure was not a substantial factor because he only worked on these traps once or twice. The same was recommended for Buffalo, as "…Plaintiffs have not shown 'a high enough level of exposure that an inference that the asbestos was a substantial factor in the injury is more than conjectural.'"

Read the full decision here.

Summary Judgment to Shipbuilders Upheld on Appeal Since Ships Are Not Products and Rejection of Plaintiffs' Every Exposure Claim

(U.S. Court of Appeals for the Ninth Circuit, March 31, 2016)

In this case, the decedent, James McIndoe, was alleged to have been exposed to asbestos pipe insulation while serving aboard the USS Coral Sea, built by Huntington Ingalls Inc., from 1961–63 and the *USS Wordern*, built by Bath Iron Works Corporation from 1966-67. The case was removed to federal court under the federal officer removal statute, and Huntington and Bath moved for summary judgment. The district court granted the motions "on the grounds that the ships were not products for purposes of strict liability and that the heirs could not establish a genuine issue of material fact regarding whether the shipbuilders were responsible for installing any asbestos-containing insulation that caused McIndoe's injuries." The plaintiffs appealed.

The court of appeals affirmed the lower court's decision. Regarding the plaintiffs' claims of strict product liability, the court held: "We therefore agree with the district court that McIndoe's heirs cannot sustain an action for strict products liability premised upon the notion that the warships in question are themselves 'products' under maritime law.

Accordingly, the heirs may prevail only under a theory of negligence." Regarding the negligence claims, the court rejected the plaintiffs' expert, Dr. Allen Raybin's, every exposure opinion, and held: "Notwithstanding the declaration of Dr. Raybin, McIndoe's heirs failed to put forward evidence demonstrating that McIndoe was substantially exposed to asbestos from the shipbuilders' materials for a substantial period of time. The heirs have established no genuine issue of fact regarding whether any such exposure was a substantial factor in McIndoe's injuries, and thus they cannot prevail on their general negligence claims."

Read the full decision here.

On Remand, Federal Court Again Grants Summary Judgment on Plaintiff's Maritime and State Law Claims

(U.S. District Court for the Central District of California, February 8, 2016)

In this federal court case, the court's jurisdiction was based solely on the plaintiff's assertion of maritime jurisdiction as set forth in in his fourth amended complaint. The plaintiff brought claims against 54 defendants that manufactured asbestos-containing products that the decedent, Christopher Curtis, was allegedly exposed to in three different situations: From 1955-58 while he served in the Navy, while employed as an electrician for 40 years, and while performing maintenance on his automobiles. The plaintiff settled against many of the 54 defendants, and other defendants were either dismissed or obtained summary judgment. On appeal to the Ninth Circuit, the remaining defendants were ABB, Inc., Eaton Corporation and Schneider Electric. The Ninth Circuit concluded that the court erred in granting summary judgment in that it found the plaintiff failed to raise a triable issue of fact that Curtis was exposed to asbestos from the defendants' products. The Ninth Circuit went on to state, "because of that error, the court also erred to the extent it relied on this finding to conclude that asbestos exposure from Defendants' products was not a substantial factor in causing Curtis's mesothelioma." As the Ninth Circuit held: "It is not clear from the record whether the district court decided causation in Defendants' favor on a ground other than product identification,

such as insufficient medical evidence linking Curtis' exposure to asbestos to his mesothelioma." The case was remanded for further proceedings.

On remand, the court reviewed the parties' responses to the court order requesting the submission of briefs regarding whether or not the plaintiff intended to pursue maritime claims against ABB, Eaton, and Schneider and what evidence supported such claims. The court also reviewed the previously submitted papers and again granted the remaining defendants summary judgment. As the court held: "The issue of Plaintiff's failure to provide sufficient evidence that Defendants' products were a substantial factor in causing decedent's injury, separate and apart from the issue of product identification, was presented in Defendants' Motions, and this Court has now more fully explained that this was and is an independent basis for granting summary judgment in favor of Defendants on both the maritime and state law claims. Indeed, Plaintiff made no effort to differentiate between the substantial factor causation analysis that applies to the maritime claims and the substantial factor causation analysis that applies to the state law claims. There is no evidence that would support a conclusion that decedent's brief exposure to asbestos contained in Defendants' products while he served in the Navy, when compared to his 40-year civilian career, was a substantial factor in causing his mesothelioma. Because Defendants cannot be liable on any of Plaintiff's claims against them without evidence that exposure to asbestos from their products was a substantial factor in causing decedent's mesothelioma, Defendants are entitled to summary judgment on Plaintiff's maritime claims and, additionally, on the state law claims. This is because Plaintiff did not submit any evidence, let alone sufficient medical evidence, to satisfy the substantial factor requirement on either type of claim, despite Defendants having moved for summary judgment on the substantial factor issue."

Read the full decision here.

Valve Manufacturer Granted Summary Judgment under Maritime Law Based on Lack of Causation

(U.S. District Court for the Southern District of Illinois, January 5, 2016)

In this federal court action, it is alleged that the decedent, Richard Bell, was exposed to asbestos during his service in the Navy where he served on the USS Franklin D. Roosevelt from 1961 to 1962. Velan Valve Corp. moved for summary judgment asserting maritime law.

The plaintiff did not oppose the application of maritime law. The court went on to analyze the application of maritime law and found it applied in the case. The court then went on to grant Velan summary judgment, stating that the plaintiff failed to prove causation. The plaintiff's witness, Michael Loveless, served on the Roosevelt, with the decedent and identified Velan valves aboard the ship. However, Mr. Loveless could only testify to serving with an individual named Bell while on laundry sorting detail.

As the court held: "Loveless testified that he never saw Decedent work with or around any steam traps. Loveless himself only replaced gaskets on a steam trap on two occasions during his service on the Roosevelt. This does not rise above 'mere exposure' or 'minimal contact' as required under *Lindstrom*. Further, Loveless testified that steam traps were not insulated. In other words, there was no asbestos on the traps." The court went on to state "While all reasonable inferences must be drawn in favor of Plaintiff, Plaintiff cannot create a genuine issue of material fact through mere speculation or the building of inference upon inference. Instead, inferences must be supported by facts in the record. *See* *Lindstrom*, 424 F.3d at 492 ("[A] mere showing that defendant's product was present somewhere at plaintiff's place of work is insufficient [to establish causation]). Here, the record does not contain enough evidence — direct or circumstantial – to create a genuine issue of material fact. Accordingly, summary judgment is granted."

As previously noted on December, 1, 2015, John Crane was granted summary judgment on the same grounds.

Read the full decision here.

Other Maritime/Admiralty Law Decisions:

- **Expert Challenges**

    - **Regardless of Whether New York or Maritime Law Applied, Government Contractor and Bare Metal Defenses Insufficient to Grant Summary Judgment to Foster Wheeler**
      (U.S. District Court for the Northern District of New York, March 21, 2016)

- **FELA**

    - **Prior Release Found Inadequate to Dismiss Future Jones Act/FELA Claims Based on Development of Mesothelioma**
      (Supreme Court of New York, New York County, January 4, 2016)

Motions in Limine Decisions

Exclusion of Belated Theory of Exposure Upheld on Appeal

(Court of Appeals of California, Second Appellate District, Division Four, August 18, 2016)

The plaintiff sued multiple defendants, including "asbestos" and "premises" defendants, asserting claims of negligence, strict liability and premises liability based on his alleged asbestos exposure in the City of Coalinga (where he resided from 1959 to 1972) and during his 30-year career as a pipe inspector.

Defendant PAC Operating Limited Partnership was sued as a premises defendant. Its predecessor, Southern Pacific Land Company (SPLC), owned 557 acres of land in the Diablo Mountain Range, located 17 miles outside of Coalinga. In 1961, SPLC leased the land to a company primarily owned by Johns-Manville, which mined and milled asbestos ore at the site until 1972. In 1980, the EPA declared the land a "superfund" site. In 1987, the EPA also declared the Coalinga Operating Unit (Coalinga OU) (a 107 acre plot inside the City where asbestos from the mines was bagged and stored) a "superfund" site. The plaintiff's complaint did not specify the real property that formed the bases for his allegations against PAC.

During discovery, the plaintiff testified that he did not recall visiting the asbestos mills or mines in the Diablo Mountain Range when he lived in Coalinga, or hiking in that area. PAC moved for summary judgment. In his opposition, the plaintiff maintained for the first time that part of the Coalinga OU was owned by SPLC and that it was contaminated with asbestos from operations conducted on PAC's property in the mountain superfund site. In its reply, PAC argued that the Coalinga OU was actually owned by the Union Pacific Railroad, a fact which the plaintiff knew because he sued that defendant over that property in the instant lawsuit.

Shortly after the motion for summary judgment was denied, PAC moved in limine to exclude any evidence at trial that it owned the Coalinga OU, arguing that any such reference would be false. PAC further argued that, prior to the filing its motion for summary judgment, the plaintiff had not attempted to link his asbestos exposure to the Coalinga OU or any property other than the mountain superfund site.

The trial court granted the motion in limine, finding that PAC would be prejudiced at trial by the late disclosure. It concluded that PAC made legitimate efforts to prepare its defense of the case and noted the plaintiff's discovery responses which consistently failed to reference the Coalinga OU. Accordingly, the plaintiff proceeded at trial against PAC solely on the basis that he had been exposed to asbestos at the mountain superfund site. The jury concluded that the plaintiff had been exposed to asbestos from the mountain property, but that such exposure was not a substantial contributing cause of his mesothelioma.

On appeal, the plaintiff contended that the trial court abused its discretion in granting PAC's motion in limine. The appellate court determined that the trial court properly excluded the "belatedly revealed theory related to Coalinga OU" as a proper exercise of its inherent authority to control the proceedings and to ensure a fair trial.

Read the full decision here.

Certainteed Obtains Spoliation Charge on Missing Pipe and Defense Verdict Following Two-and-a-Half Week Trial

(Circuit Court of the Tenth Judicial Circuit for Highlands County, Florida, July 7, 2016)

On July 7, 2016 a Florida jury rendered a defense verdict on behalf of building products manufacturer Certainteed Corporation. In this case, it was alleged that the decedent was exposed to asbestos and developed mesothelioma from his work cutting couplings on Certainteed asbestos-containing irrigation pipe next to his family property for an approximate two-week period in either 1969 or 1970. Through discovery it was learned that some of the pipe was removed and reinstalled. After finding witnesses who were able to testify where the reinstalled piping was located, Certainteed excavated the pipe and it was found to be made by another manufacturer. Additionally, the decedent had stored some of the piping for over 40 years on his property. Through discovery it was learned that a personal representative of the estate, who was also one of the plaintiffs in the case and serving as the president of the decedent's company, had the pipe disposed of during the ongoing litigation. This prompted Certainteed to file a spoliation motion, which it won. The court subsequently gave an adverse inference charge to the jury.

Read the verdict sheet here.

Other Motions in Limine Decisions:

- **Expert Challenges**

    - **Mixed Decision on Defendants' Motion in Limine to Preclude Dr. James Millette**
      (U.S. District Court for the Eastern District of Louisiana, October 11, 2016)

    - **Federal Court Limits Plaintiff's Expert, Dr. William Longo's Testimony**
      (U.S. District Court for the Middle District of Florida, Jacksonville Division, June 21, 2016)

    - **Plaintiff's Expert Testimony Precluded and Summary Judgment Granted Where Expert Opinion Did Not Rely Upon Sufficient Facts or Data**
      (U.S. District Court for the District of Maryland, June 6, 2016)

    - **Plaintiff's Expert's Testimony Precluded and Summary Judgment Granted Where Expert Disclosure Was Untimely, the Expert Opinion Lacked Sufficient Factual Basis, and Plaintiff's Claims Were Legally Insufficient on Causation**
      (U.S. District Court for the District of Maryland, May 18, 2016)

    - **Court of Appeals of Ohio Finds Reversible Error in Refusal of Daubert Hearing On Basis of Opinions of Drs. Strauchen and Frank**
      (Court of Appeals of Ohio, Eighth Appellate District, Cuyahoga County, May 5, 2016)

    - **Citing New York Case Law, Court Denies Crane Co.'s Motion in Limine to Preclude 'Each and Every Exposure' Opinion**
      (Supreme Court of New York, New York County, April 21, 2016)

- **Regardless of Whether New York or Maritime Law Applied, Government Contractor and Bare Metal Defenses Insufficient to Grant Summary Judgment to Foster Wheeler**
  (U.S. District Court for the Northern District of New York, March 21, 2016)

Pleadings Challenge Decisions

U.S. District Court of Connecticut Denies Motion to Dismiss Punitive Damages Count Based on Sufficiency of Pleading

(U.S. District Court for the District of Connecticut, May 4, 2016)

In this case pending in the U.S. District Court for the District of Connecticut, the plaintiffs' third count of their complaint alleges reckless conduct by the defendants and seeks punitive damages. Defendant Aurora Pump Company moved to dismiss this count, arguing that the plaintiff failed to assert specific allegations of recklessness. The court noted, however, that the plaintiff alleges that the defendants manufactured, distributed, sold or otherwise placed into the stream of commerce products which contained asbestos and that the defendants intentionally and fraudulently concealed the dangers of breathing asbestos from plaintiff and the public. Aurora responded that these allegations are "nothing more than allegations of negligence," and the plaintiff's complaint lacks allegations setting out "highly unreasonable conduct" giving rise to a valid recklessness claim.

The court, looking to a case involving New York law which employs a comparable recklessness standard, noted that "imputed knowledge of the dangers of asbestos combined with inadequate protection of product users may be sufficient to subject a defendant manufacturer or distributor of asbestos containing products to punitive damages." The court denied the motion to dismiss finding that the plaintiff's third count adequately alleges recklessness as a matter of law.

Read the full decision here.

Partial Motion to Dismiss of Talc Suppliers and Auto-Body Filler Granted Without Prejudice, Giving Plaintiff Time to Amend Claims of Concerted Acts and Intentional and Negligent Misrepresentation

(U.S. District Court for the Middle District of Florida, Ocala Division, April 8, 2016)

This action was originally commenced by the plaintiff in the Southern District of New York and alleged that the decedent, Pedro Rosado-Rivera, was exposed to asbestos-containing auto-body filler while working in auto shops in New York (1959-1968), Puerto Rico (1968-1992) and then thereafter in Florida. The defendant BASF Catalysts LLC's, joined by other defendants Superior Materials, Inc. and Whittaker, Clark & Daniels, Inc., motion to transfer the case to the middle district of Florida was granted. (BASF and Whittaker were talc suppliers and Superior was a regional distributor of the auto-body filler used by decedent). Subsequently, the defendants moved to dismiss the plaintiff's claims of intentional and negligent misrepresentation and concerted acts.

The plaintiff did not respond to the defendant's argument regarding concerted acts and the court granted the motions on that argument without prejudice for the plaintiff to amended the claim if she chose to. Regarding the claim of intentional or negligent representation, the court stated that the plaintiff must "satisfy the heightened pleading standard of Federal Rule of Civil Procedure 9(b), which requires that 'a party must state with particularity the circumstances constituting fraud.'"(Internal citation omitted). The court then found the plaintiff's claim insufficient under Rule 9(b), but again gave the plaintiff the opportunity to amend this claim.

Read the full decision here.

Airplane Manufacturer Granted Dismissal in N.Y. Federal Court Action for Lack of Jurisdiction Even Though Registered to do Business and Appointed an Agent for Service of Process

(U.S. Court of Appeals for The Second Circuit, February 18, 2016)

In this federal court case, it was alleged that the decedent, Walter Brown, was exposed to asbestos while serving as an airplane mechanic in the U.S. Air force from 1950-1970. During that time, he worked at various bases in Europe and in the U.S. in Alabama, Delaware, Georgia, Illinois, New Mexico, and Michigan. Prior to his passing, the decedent, who was living in Alabama, sued 14 companies, including Lockheed Martin Corporation in the United States District Court for the Southern District of Alabama. A motion to dismiss was brought on statute of limitations grounds and the decedent voluntarily withdrew his action. Subsequently, the decedent commenced an action in Connecticut Superior Court in October 2012 against Lockheed, and various other defendants, which alleged the same claims in his previous action. Shortly after commencing the new action, the decedent died and his daughter, Cindy Brown, as the personal representative of his estate, replaced the decedent as the plaintiff. Following jurisdictional discovery regarding Lockheed's contacts with Connecticut, Lockheed renewed its Rule 12(b)(2) motion and in May 2014 the District Court dismissed the case. In its decision, the court applied Connecticut law, and stated "Lockheed was subject to the Connecticut long-arm statute by virtue of its registration to do business in the state, but that the effective reach of the statute is curbed by federal due process principles. Under those principles, the court ruled, Lockheed's contacts were not substantial enough to support the court's exercise of general jurisdiction over it." Following the dismissal, the plaintiff appealed.

On appeal, the court went into a lengthy discussion on specific and general personal jurisdiction and weighed Lockheed's connections to Connecticut, including it being registered to do business in that state and having appointed an agent for service of process. In upholding the District Court's dismissal, the court held: "In the absence of a clear legislative statement and a definitive interpretation by the Connecticut Supreme Court and in light of constitutional concerns, we construe Connecticut's registration statute and appointment of agent provisions not to require registrant corporations that have appointed agents for service of process to submit to the general jurisdiction of Connecticut courts. The judgment of the District Court is AFFIRMED."

Read the full decision here.

Defendants, Miners and Suppliers of Talc, Granted Motions to Dismiss Plaintiff's Claim of Market Share Liability as Manufacturer of the Product was Identifiable

(Supreme Court of New York, New York County, February 8, 2016)

In this case, it is alleged that the plaintiff, Keri Logiudice, contracted mesothelioma from her use of Cashmere Bouquet cosmetic talcum powder. The defendants, Cyprus Amax Minerals and Imerys Talc America Inc., mined and supplied talc to Colgate, the manufacturer of Cashmere Bouquet, and moved to dismiss the plaintiff's sixth cause of action for market share liability.

In its decision, the court explained: "In a products liability action, identification of the exact defendant whose product injured the plaintiff is generally required (see *Hymowitz v Eli Lilly & Co*., 73 NY2d 487, 504 [1989]). Market share liability provides an exception to the general negligence rule that a plaintiff must prove that the defendant's conduct was a cause-in-fact of the injury (*Hamilton v Berretta*, 96 NY2d at 240, 5 supra; see also *Brenner v American Cyanamid Co.*, 263 AD2d 165, supra ['market share liability is indeed a seldom used exception to the general rule in products liability actions that a plaintiff 'must establish by competent proof … that it was the defendant who manufactured and placed in the stream of commerce the injury-causing defective product']."

The court went on to grant the motion as Colgate, the manufacturer of the Cashmere Bouquet, was identifiable. As the court held: "Unlike in *Hymowitz*, plaintiffs are not left without a 'remedy for injuries' (73 NY2d at 507 supra) because they could recover one hundred percent of their damages from Colgate. Although it will be more difficult, or even impossible, for plaintiffs to demonstrate the liability (if any) of Cyprus and Imerys, market share liability does not afford potential recovery from each and every defendant. It was applied in *Hymowitz* because, among other things, plaintiffs would be left without any recourse whatsoever. While the potential for a full recovery against Colgate is preclusive of the application of market share liability here, it is also notable that plaintiffs may still be able to prove that Cyprus and Imerys are liable. Plaintiffs themselves note that '[a]dditional discovery from the filing defendant and its co-defendants may provide pertinent information as to whether Colgate mixed talc from several suppliers or whether each bottle was manufactured from one particular talc supplier'(Shaikh Aft 9/16/15, fn. 3, NYSCEF Doc 151)." Read the full decision here.

Other Pleadings Challenge Decisions:

- **Federal Officer Jurisdiction**
  - **Denial of Administrative Dismissal Turns on Definition of a "Smoker" Under Ohio State Code**
    (Court of Appeals of Ohio, Eighth Appellate District, November 17, 2016)

Remand/Removal Decisions

Affidavits Used in Other Cases Enough to Establish Removal Under Federal Officer Jurisdiction

(U.S. District Court for the Southern District of Illinois, November 30, 2016)

The plaintiff brought a wrongful death lawsuit after her husband died of mesothelioma, alleging asbestos exposure during her husband's service in the Navy. Originally filed in Madison County, Illinois, defendant Crane Co. removed on the basis of the federal officer removal statute. The plaintiff filed a motion to remand, arguing that Crane waived its right to remove by first filing a motion to dismiss in state court, and that Crane failed to establish federal subject matter jurisdiction. The court denied the plaintiff's motion.

Regarding waiver of removal by first filing a motion to dismiss, the Seventh Circuit has found that waiver cannot be a basis for remand except in "extreme situations." Since this ruling was made, the language interpreted by the Seventh Circuit has been deleted. Most district courts have continued to follow this ruling and have held that filing motions to dismiss or taking other preliminary actions in state court did not constitute waiver of the right to remove.

The plaintiff next argued that Crane failed to establish federal officer jurisdiction because Crane's supporting affidavits were devoid of specific facts applicable to this case; the affidavits were filed in other asbestos cases in other jurisdictions, and none of the affiants worked for Crane at the time the products at issue were made. Further, Crane provided no evidence of contracts, specific warning requirements from the Navy, and no evidence of warnings Crane gave to the government about asbestos.

The court found that the evidentiary materials attached to Crane's removal were sufficient to support removal. Several other courts have found nearly identical evidence adequate to merit removal under federal officer jurisdiction. In analyzing the merits of Crane's removal, the court likewise found that Crane satisfied the elements necessary to plausibly establish the government contractor defense. "'As the Seventh Circuit pointed out…the validity of Crane's defense may be hotly contested and may present complex issues, 'but the propriety of removal does not depend on answers' to those questions; rather 'the claimed defense need only be plausible.'"

Read the full decision here.

Take Home Mesothelioma Case Remanded After Plaintiff Adds Dismissed Defendant to Amended Complaint

(U.S. District Court for the Middle District of Louisiana, November 4, 2016)

Charleen Guedry brought this action against multiple defendants for her alleged development of mesothelioma as a result of exposure through her husband's work clothes. Mr. Guedry worked at International Maintenance/Turner from 1983-2005.

The plaintiffs moved to dismiss claims without prejudice against defendant Arnco on May 12, 2016. Co-defendant Brock indicated to the plaintiffs its intent to remove the case on diversity since Arnco was being dismissed. On May 19, 2016, the plaintiffs withdrew the dismissal of Arnco and desired to conduct discovery based on receiving "several invoices indicating that Arnco supplied material to the premises at issue." The court granted the plaintiffs' dismissal,

but did not docket the same until May 23, 2016. On May 25, 2016, Brock removed the action on diversity jurisdiction. The plaintiffs then filed for Motion for Leave to file a Second Amended and Supplemental Complaint to rename Arnco.

The court began its analysis with the standard for amendment of pleadings. Under Fed Rule 15, "a party may amend its pleadings only with the opposing party's written consent or the court's leave" and the "court should freely give leave when justice so requires." The court noted the bias in favor of granting leave to amend. Relying on the decision in *Hensgens,* the factors for determining whether amendment is appropriate includes 1) the extent to which the purpose of the amendment is to defeat federal jurisdiction 2) whether the plaintiff has been dilatory in asking for amendment 3) whether the plaintiff will be significantly injured if amendment is not allowed, and 4) any other factors bearing on the equities. The court quickly found that the first factor was resolved in favor of the plaintiff. Here, Arnco was alleged to have been responsible for the plaintiffs' injuries. Further, the plaintiffs took the position that Arnco supplied "thousands of products" that may have contained asbestos based on its discovery responses. Moreover, those invoices were not produced by Arnco for 5 months during the state court litigation. Brock countered and stated that the plaintiffs' contentions that it denied them access to discovery is nothing more than an attempt to get the case back to state court. Brock pointed out that the plaintiffs did not seek relief to get the discovery requests while the matter was in state court. The court agreed that the plaintiffs sought to amend in part to remand and found that the plaintiffs had "evidenced their intent to seek judgment against the non-diverse defendant from the outset of the litigation in state court." The second factor under *Hensgens* also weighed in favor of the plaintiffs as they filed the motion within one month after the dismissal of Arnco. The court also found that the third factor went to the plaintiffs' favor. A denial of the motion would have added costs to file a new suit against Arnco. The fourth and final factor was found neutral by the court. Here, the plaintiffs argued that Arnco had not participated in good faith discovery. Brock argued that the plaintiffs did nothing to seek relief while in state court. In considering the totality of the evidence, the court found that the factors weighed in favor of allowing the proposed amendment to add Arnco.

Read the full decision here.

Grant of Remand to State Court Reversed in Favor of Shipyard Defendants

(U.S. Court of Appeals for the Fourth Circuit, November 1, 2016)

The plaintiffs brought this action in state court against numerous defendants including Foster Wheeler LLC and Foster Wheeler Energy Corporation alleging Mr. Ripley developed mesothelioma while working as a boilermaker at Norfolk Naval Shipyard in Virginia from 1969-72 and again from 1974 until the late 1970s. Foster Wheeler removed the case based on the federal officer removal statute. Specifically, Foster Wheeler asserted the government contractor defense. The plaintiff moved to remand. Following "decades old practice of denying the government contractor defense in a failure to warn case," the court remanded the case. Foster Wheeler appealed.

The court ran through an analysis of federal officer removal and stated the a defendant is permitted to remove on federal officer removal when the following is established 1) it is a federal officer or a "person acting under that officer" 2) a colorable federal defense; and 3) the suit is "for an act under the color of office," which requires a causal nexus between the charged conduct and asserted official authority. The court noted that the defendant does not have "to win" his case just to remove it. Relying on precedent from the *Boyle* decision, the court stated that design defects in military equipment do not "give rise to state tort law." For its reasoning, the court noted that the judicial branch should be reluctant to involve itself in military decisions based on separation of powers. Also noted was the concern that more risk for government contractors meant higher cost for government.

The court concluded that the Eastern District of Virginia's decision to deny government contractor defense was an "outlier" amongst other jurisdictions. Further, the court found that Boyle was still applicable in a failure to warn case. The court remanded the case for a determination as to whether Foster Wheeler had put forth sufficient proof to warrant removal.

Read the full decision here.

Various Cases Remanded to State Court After Joinder of Law Firm Alleged to Have Induced Plaintiffs to Accept Artificially Low Settlement Amounts Extinguished Diversity Jurisdiction

(U.S. District Court for the District of Hawaii, October 31, 2016)

Various plaintiffs (Baclaan plaintiffs) filed a motion to remand and/or abstain and a motion for leave to name a new party defendant. Other groups of plaintiffs (Toro plaintiffs and Hopkins plaintiffs) filed similar motions in their respective cases. Defendant Arter & Hadden LLP (A&H) filed a joint memorandum in opposition to all three motions, to which all three groups of plaintiffs replied. The court granted all the motions and remanded all cases to state court. Baclaan and Toro plaintiffs are class actions and Hopkins is an individual action, all originally filed in state court in December 2002. All alleged they were induced to settle for nuisance value with Combustion Engineering, and after settlement discovered false responses to interrogatories. The plaintiffs alleged that defendants The Travelers Insurance Company and The Travelers Indemnity Company (Travelers defendants) designed a scheme implemented by their attorneys to withhold information to induce nuisance settlements. Beginning in 2003, Travelers defendants removed these cases at different times based upon various jurisdictional bases. After a number of procedural occurrences, the Baclaan plaintiffs filed these motions in 2016.

First, the Baclaan plaintiffs argued that diversity jurisdiction did not exist at the time of removal because defendant C.-P. Char, an attorney, was a Hawaii resident, and his unforeseen death after the filing of their complaint did not extinguish their claims against him. Second, the "related-to" jurisdiction did not exist at the time of removal because there was not enough of a connection between their claims and Combustion Engineering's bankruptcy proceeding. Third, since neither diversity nor related-to jurisdiction existed, there was no basis for supplemental jurisdiction over the state law claims.

Regarding diversity, Travelers defendants argued that Char's citizenship had to be disregarded because he died prior to removal. The court found that that under Hawaiian law personal actions died with the person. Thus at the time of removal, there was complete diversity amongst the parties.

After removal the Baclaan and Toro plaintiffs attempted to join the law firm of Char Hamilton, a Hawaii corporation and non-diverse defendant which allegedly was part of the conspiracy to induce the plaintiffs to accept artificially low settlement amounts. Under Section 1447(e), courts examine six factors in determining whether to allow the addition of a non-diverse defendant. The following factors weighed in favor of joinder: no unexplained delay; timely joinder; validity of claims. Although "the issue of whether the intent behind the joinder of Char Hamilton was to defeat diversity jurisdiction is a close one," the death of Char was unforeseen; thus the court could not find that the joinder of Char Hamilton was solely to defeat federal jurisdiction. Since four of the six factors weighed in favor of allowing joinder, the court allowed the joinder of Char Hamilton, which defeated diversity jurisdiction.

The court also analyzed "related-to" jurisdiction; although this existed, the court remanded based upon equitable factors. The court declined to exercise supplemental jurisdiction.

Read the full decision here.

Identity of Navy Ship Where Plaintiff Served Enough to Trigger Federal Officer Removability Clock

(U.S. District Court for the District of Maryland, October 27, 2016)

Plaintiff Marvin Smith alleged asbestos exposure while serving as a fireman in the U.S. Navy from 1951-54, and while working as a fireman and warehouseman at various shipyards and warehouses. The plaintiff and his wife sued various defendants in state court after he was diagnosed with pleural mesothelioma. Defendant Crane Co. removed this mesothelioma case to federal court under the federal officer removal statute; the plaintiffs moved to remand, alleging untimely removal, which the court granted.

The plaintiffs argued removability was ascertainable when Smith was deposed; Crane argued it was ascertainable after the plaintiffs filed supplemental answers to joint interrogatories approximately eight months after the plaintiff's deposition. During his deposition, the plaintiff testified regarding his naval service and his work performed on valves and gaskets on the USS Dortch. Supplemental interrogatory responses stated the plaintiff was exposed to equipment manufactured and sold by Crane on the USS Dortch.

The plaintiffs argued Smith's deposition testimony was detailed enough for Crane to ascertain removability. The court pointed the parties to a trio of cases decided in October 2012, wherein the court found General Electric's removal timely because it was done within 30 days of receipt of interrogatory answers. "…[T]he 30 day clock for federal officer removability 'begins ticking when the initial pleading or another appropriate paper reveals the nexus between the plaintiff's claims and the actions allegedly taken by the defendant under the direction of a federal officer…the identity of the exact U.S. Navy ships on which the plaintiff was allegedly exposed to the defendant's asbestos products gave the defendants adequate notice' to trigger the 30 day removal timeframe." Here, the identification of the USS Dortch as the Navy ship on which Smith served and was allegedly exposed to asbestos was sufficient to put Crane on notice that the action was subject to removal. Thus, Crane's notice of removal was untimely.

Read the full decision here.

Plaintiff's Motion for Costs, Fees, Expenses, and Sanctions Denied but Granted as to Remand for Untimely Removal

(U.S. District Court for the Eastern District of Missouri, Eastern Division, October 27, 2016)

The plaintiff brought this suit against numerous defendants including Ford Motor Company. She alleged that the decedent developed and passed from mesothelioma as a result of exposure to dust from products manufactured, sold, and distributed while Mr. Bristol worked as a mechanic at a Ford dealership from 1972-1989.

Ford removed the case a day after trial began and well over a year from the date the complaint was filed. The plaintiff moved for sanctions and to remand stating that Ford failed to obtain consent of the remaining defendants and that the removal was untimely. Ford contended that the plaintiff acted in bad faith to prevent removal. Further, Ford argued that it did not need consent to remove because it was the last defendant in this action. In support, Ford stated that the plaintiff argued in its response to a motion to dismiss that the plaintiff had resolved or dismissed her claims against every defendant other than Ford. For that reason, Ford took the position that sanctions were unwarranted. The court agreed that Ford was not required to obtain consent from the other defendants. First, consent from dismissed defendants is not required. Second, the plaintiff's statement in her October 24, 2016 response to the motion to dismiss "was effective to establish that Ford was the only remaining defendant in this action." However, Ford did not establish that the plaintiff acted in bad faith to prevent removal according to the court. Primarily, Ford relied on the fact that the plaintiff had not prosecuted her claims against co-defendant Mendenhall. Specifically, Ford pointed out that the plaintiff had not sought discovery from Mendenhall and that the plaintiff offered a "product identification stipulation" to Mendenhall during a deposition. Relying on the Aguayo case, the court was not persuaded as the evidence showed that Mendenhall and the plaintiff were in negotiations to settle throughout the course of the litigation. Further, the court noted that although discovery was not served upon Mendenhall "Plaintiff provided a plausible explanations for the absence of documented discovery from Mendenhall." Here, the plaintiff received the discovery they needed from Mendenhall in a different case. Ultimately, the court found Ford's removal untimely.

As for the plaintiff's motion for costs, sanctions and fees, the court found that Ford's removal was not unreasonable. In particular, the court noted that no depositions had been noted between Mendenhall and no response was filed by the plaintiff to Mendenhall's motion for summary judgment. Accordingly, the motion for sanctions was denied.

Read the full decision here.

Removal Found Procedurally Proper Based on Diversity

(U.S. District Court for the Eastern District of Louisiana, October 24, 2016)

The plaintiffs, Nolan and Susan Legeaux, brought a motion to remand their asbestos case from federal court arguing that removing defendants failed to follow the correct removal procedure, that there are non-diverse defendants, and that the federal officer removal statute, 28 U.S.C. § 1442, is not applicable to the facts of the case. The motion was opposed by defendants Puget Sound Commerce Center, Inc., Vigor Industrial LLC, and Vigor Shipyards, Inc.
The plaintiffs' motion was denied. The court found there was nothing procedurally improper about the removal since all properly joined and served defendants consented to the removal. The court also found there to be complete diversity in that one defendant's bankruptcy was filed prior to the state court action (if the bankruptcy had been filed while the case was pending in state court removal would have been improper) and the plaintiffs' motion to add another non-diverse defendant was denied. Based on the court's findings that diversity jurisdiction existed and that the removal was procedurally proper, it did not reach the question of whether removal was appropriate under the federal officer removal statute. Read the full decision here.

Case Remanded on Basis of Failure of Removing Party to Meet Burden of Proof on Improper Joinder

(U.S. District Court for the Eastern District of Louisiana, September 14, 2016)

Plaintiff William Bozeman brought suit alleging exposure to asbestos and asbestos-containing products caused him to contract mesothelioma. Mr. Bozeman, a Louisiana resident, worked for Arizona Chemical Company, later known as International Paper Company, from 1975 to 1981 and 1981 to 1999 in Louisiana and claims he was exposed while on the job. He filed suit in the Civil District Court for Orleans Parish. On September 9, 2016 defendant Wyeth Holding Corp., formerly known as American Cyanamid Company removed the case to the U.S. District Court for the Eastern District of Louisiana on the basis of diversity jurisdiction days before trial was set to begin on September 12, 2016. Cyanamid maintained that as of August 12, 2016 all but four Louisiana defendants had settled or been dismissed, that on August 12 three of the remaining four defendants obtained summary judgment, and that at that time then came became removable because the only remaining non-diver defendant, Taylor-Seidenbach, Inc. (Taylor), was improperly joined. Cyanamid argued that Taylor was improperly joined because there was no reasonable basis for predicting that Plaintiffs could recover against this defendant in state court.

The District Court explained that the U.S. Court of Appeals for the Fifth Circuit recognizes two ways to establish improper joinder: "(1) actual fraud in the pleading of jurisdictional facts, or (2) inability of the plaintiff to establish a cause of action against the nondiverse party in state court." Smallwood v. Ill. Cent. R.R., 385 F.3d 568, 573 (5th Cir. 2004). The analysis in this case focused solely on the second method. The court explained that to determine whether a plaintiff has a reasonable basis of recovery under state law, a court may resolve the issue in one of two ways. First, the court may conduct a Rule 12(b)(6) analysis, looking initially at the allegations of the complaint to determine whether the complaint states a claim against the non-diverse defendant, and that it is generally held that if a plaintiff can survive a Rule 12(b)(6) challenge, there is no improper joinder. Second, in such cases where a plaintiff has stated a claim but has "misstated or omitted discrete facts" that would determine the appropriateness of joinder, the district court may use its discretion to "pierce the pleadings" and conduct a summary inquiry. In this case, the court stated that "given that discovery was complete and trial set to begin, we believe it would be an abuse of discretion not to pierce the pleadings in determining the appropriateness of joinder."

The court explained that the burden on a party claiming improper joinder is a heavy one, and the defendant must put forward evidence that would negate a possibility of liability on the part of the nondiverse defendant. Here, the court found that the three pieces of evidence relied on by Cyanamid did not negate the possibility of recovery against Taylor. Cyanamid's evidence (deposition testimony of the plaintiff, his co-workers, and the plaintiff's social security earning statement) was offered to show that the plaintiff and his co-workers had no knowledge of Taylor, but the court rejected the conclusion that this negates the possibility of recovery against Taylor because the "fact that Plaintiff and his co-workers did not know the name of a potential supplier is not convincing evidence as to whether that supplier actually provided Plaintiff's employer with asbestos-containing products at a time and place where he was working with, and exposed to, such products." In sum, the court found that Cyanamid could not meet its heavy burden of proving improper joinder and granted the plaintiff's motion to remand the case.

Read the full decision here.

Remand Granted Based on Finding that Plaintiffs Acted in Good Faith Naming Defendant With State Contact

(U.S. District Court, Northern District of California, August 22, 2016)

The plaintiffs sued multiple defendants including several "citizens" of California. Four days before trial defendant John Crane Inc. removed the case to federal court on diversity. The plaintiff then moved to remand.

The court began its analysis by stating the legal standard for removal which permits removal when the federal court could have "exercised original jurisdiction" in the case. Additionally, the burden falls upon the removing defendant. A case may be removed under diversity unless one of the parties is a properly joined and served defendant of that state. A notice of removal must be filed within 30 days of service of paper from which the removing defendant could "ascertain" that the case is removable.

The defendant took the position that it was not aware that the case was removable until after "Plaintiff served and filed their Trial Brief" which showed only non-Californian defendants. The plaintiffs argued that removal was precluded since it occurred more than "one year after commencement" of the action. The defendant argued that the one year requirement should not be applied because the plaintiffs acted in bad faith in joining California citizens that

the plaintiffs knew that did "not have facts to succeed on any of the claims against those California defendants." In reliance of this argument, defendant pointed that the plaintiff confirmed in his deposition that he did not know one of the California defendants, Thomas Dee Engineering "Dee", although the plaintiff kept Dee in the case until after the one year deadline. In the plaintiffs' reply to the Motion to Remand, the plaintiffs asserted that Dee was dismissed after it paid settlement to the plaintiffs. Further, the plaintiff stated that the basis for naming Dee was that it was a boiler contractor on a navy ship on which the plaintiff was a boiler tender. The court concluded that the plaintiffs did not act in bad faith and remanded the case.

As for the plaintiffs fees and costs, the court ordered the plaintiff to submit a stipulated request for a specific amount. In the alternative, the court would take the matter under submission should the parties contest costs.

Read the full decision here.

Plaintiff's Attempt to Avoid Federal Subject Matter Jurisdiction by Disclaiming Federal Officer Claims Unsuccessful

(U.S. District Court for the Eastern District of Missouri, Eastern Division, August 5, 2016)

The plaintiff asserted various claims against 78 defendants due to mesothelioma developed from alleged asbestos exposure incurred during his civilian work in the Navy from 1958-64, Kambien from 1966-69, and Polaroid from 1969-97. The plaintiff attempted to make the action un-removable by disclaiming any relief for injuries sustained upon a federal enclave or as a result of malfeasance of persons acting as federal officers. However, the plaintiff's deposition testimony triggered defendant Crane's right to remove. Crane timely removed and the plaintiff moved to remand, which was denied.

The plaintiff testified he was a marine machinist from 1958-64; during this time he removed asbestos insulation and coatings from valves which contained asbestos gaskets. New asbestos-containing valves and those he repaired were made by Crane. Based on this testimony Crane removed due to the federal contractor defense, and submitted evidence of the Navy's total control over all aspects of Crane's design and manufacture of components for Navy vessels. The court summarized the evidence of total Navy control in its opinion. The Navy knew of asbestos hazards, and like all contracted components made for the Navy, Crane's valves were tested for strict compliance. In his motion to remand, the plaintiff argued that: (1) he renounced federal subject matter jurisdiction in the complaint, and (2) Crane did not meet its burden to show jurisdiction, and cited precedent from other jurisdictions which remanded similar cases.

The court found that first, suits against federal officers may be removed despite the non-federal case of the complaint; the federal-question element was met if the defense depended on federal law. Second, under Supreme Court and Eighth Circuit precedent, the plaintiff's claim failed. Although the plaintiff alleges failure-to-warn claims against Crane as well, the entire case was removable if even one claim fell within the scope of 28 U.S.C. § 1442(a)(1). "Consequently, plaintiff could not have been exposed to Crane's valves while working for the Navy if those valves had not contained and been covered in asbestos, as the Navy demanded…Crane has thus cleared the low hurdle to show a causal connection between its decision to include asbestos on and in the valves and the Navy's directive to do so."

Read the full decision here.

U.S. District Court Applies Foreign State Removal and Denies Plaintiff's Motion for Remand

(U.S. District Court for the Eastern District of Louisiana, July 14, 2016)

The plaintiff brought an action against multiple defendants for his alleged occupational exposure to lung cancer while working as a longshoreman for different stevedoring companies from 1954-1979. Included with the numerous defendants was Industrial Development Corporation of South Africa, Ltd. (IDC) and South African Marine. The plaintiff's claims included negligence, strict liability, intentional tort, and premises liability. Specific to IDC and South African Marine, the plaintiff asserted claims under the Jones Act.

Immediately after filing suit, the plaintiff filed a motion to dismiss his claims against IDC and South African. Prior to the court ruling on the Motion to Dismiss, another defendant, Cooper/T. Smith filed a third-party claim against IDC and South African. IDC invoked 28 U.S.C. § 1441 and the Foreign Sovereign Immunities Act (FSIA) and filed a notice

of removal. The plaintiff moved to remand the case to state court, arguing that remand should be granted for the following reasons: 1) IDC's notice of removal failed to demonstrate its status as an agency or party to this lawsuit 2) IDC's removal was untimely 3) IDC is not a proper party to the suit because Cooper/T. Smith was incapable of asserting a third party claim against IDC after Plaintiff moved to dismiss claims against IDC 4) the claim asserting the Jones Act against IDC prevents removal 5) Cooper/T. Smith's claims against "illusory" and were only being used to create federal jurisdiction. The plaintiff also argued that if remand was proper, the court should sever the third party claim and remand the main action to state court.

The court discussed the FSIA and found that although IDC's notice of removal did not expressly state that "IDC knows no home beyond its South African borders" that only a "short and plain statement of the grounds for removal " be present. Further, the court noted that the notice stated that IDC was wholly owned by the South African government. IDC also submitted, through its attorneys, declarations that it was a state owned financial institution. The plaintiff did not dispute this according to the court. As for the argument that the Notice of Removal was untimely, the court stated that the FSIA provides for an enlargement of the time for removal for cause shown. Although IDC removed 32 days after receiving the complaint, nothing suggested that it had to be made to delay the proceedings. Further, the court honed in on the fact that nothing much had taken place from the filing of the complaint to removal and therefore, the plaintiff was not prejudiced by the late filing.

The plaintiff insisted that its claims against IDC had been dismissed by virtue of filing his Motion to Dismiss IDC. The Court disagreed and stated the definition of a Motion which is a "written or oral application requesting a court to make a ruling" on the Motion. Accordingly, the Motion itself carried no legal weight. Further, the Court found that the claim for the Jones Act also failed to warrant remand. Although typically the Jones Act prevents removal, the court doubted whether the Plaintiff was a Jones Act seaman within definition. The court was further concerned with whether or not the Jones Act trumped the FSIA. The court denied the plaintiff's motion to remand on the grounds of the Jones Act. The plaintiff continued his argument and took the position that the third party claim should be severed from the remaining action. The court disagreed and noted that the third party claim vested supplemental jurisdiction of the federal court over the claims. The court also disagreed that it needed to exercise discretion and remand all the claims except the third party claim. Specifically, the court stated that "common facts" united the primary claims with the third party claim and declined to exercise discretion as requested by the plaintiff.

Finally, the court addressed the claim that IDC was an "Illusory" defendant. Although the court acknowledged the plaintiff's concerns, IDC was nevertheless a defendant to this matter. Nothing was pled by the plaintiff to suggest collusion between Cooper/T. Smith and IDC. However, IDC had adopted the plaintiff's argument that it had been dismissed from the complaint by virtue of the plaintiff's Motion to Dismiss. As a result, the Ccurt ordered that IDC file its Motion to Dismiss Cooper/T. Smith's third party demand. Should IDC fail to comply, then the court would consider collusive joinder.

Read the full decision here.

Indiana Found to be Proper Venue in Federal Court Case that was Previously Transferred Based on Convenience and in the Interest of Justice

(U.S. District Court for the Northern District of Indiana, Hannond Division, July 13, 2016)

In this federal court case, the plaintiff, Clovis Aresnault, commenced an action in the Northern District of Indiana alleging exposure to asbestos while working in steel mills in Illinois and at a plant located both in Illinois and the Northern District of Indiana. The case was transferred to the Eastern District of Pennsylvania as part of the multi-district litigation. The case was remanded back to Indiana after an order granted part of defendant's motion for summary judgment. The plaintiff subsequently moved to transfer the case to the Northern District of Illinois pursuant to 28 U.S.C. § 1404(a) and defendant, CBS Corporation, opposed.

In the court's analysis, it noted: "28 U.S.C. § 1404(a) is the provision of the United States Code that governs change of venue and provides that '[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented.' Therefore, for a case to be transferred, the movant must demonstrate that (1) venue is proper in the transferor court; (2) venue is proper in the transferee court; and (3) the transfer serves the convenience of the parties and witnesses and is in the interests of justice. The decision to transfer an action is within the sound discretion of the trial court, and the analysis is made on a case-by-case, fact-intensive inquiry; the statute does not indicate the relative weight to be accorded each factor." (Internal citations omitted). The court denied the transfer motion and held: "In considering all of the factors and Plaintiff's insubstantial argument, Plaintiff has not

met his burden of showing that the Northern District of Illinois is a 'clearly more convenient' forum than the Northern District of Indiana."

Read the full decision here.

Magistrate Judge Recommends Remand to State Court; Removal was Timely, but Defendant Failed to Establish Two of Four Elements of Federal Officer Statute

(U.S. District Court for the District of Delaware, June 10, 2016)

The plaintiffs filed this personal injury suit in Delaware after the plaintiff Donnie Wines was diagnosed with mesothelioma. Both plaintiffs died before the suit was completed, and their personal representative was substituted. Defendant Rockwell Automation Inc. removed to federal court. The plaintiff filed a motion to remand, arguing: (1) that the notice of removal was untimely, and (2) Rockwell did not meet the requirements of the federal officer removal statute. The magistrate judge recommended that the court grant the plaintiff's motion.

The plaintiff claimed exposure from working as an electrician, instructor, and supervisor for Newport News Shipbuilding from 1961-77, and while performing other electrical work and automotive repair. Interrogatory responses identified a dozen Navy vessels the plaintiff worked on during his alleged exposure. Rockwell admitted that it manufactured and sold industrial electrical power products from the 1930s-85, which incorporated some asbestos-containing subcomponents molded by Allen-Bradley. Rockwell removed based on the plaintiffs' allegations of exposure to Allen-Bradley components supplied to the Navy.

First, removals shall be filed within thirty days after receipt by the defendant, through service or otherwise, a copy of the initial pleading setting forth the claim for relief. If the initial pleading does not set forth a basis for removal, defendants must remove within thirty days after receiving an amended pleading, motion, order or other paper from which it may be ascertained that the case is removable. 28 U.S.C. § 1441(b)(1), § 1441(b)(3). The plaintiffs argued the thirty-day removal period started on August 11, 2014, when they filed the interrogatory responses. Rockwell contended it learned of plaintiffs' suit during a routine docket search on August 14, 2014, and was served on September 3, 2014. Reading § 1441(b)(1) and (b)(3) together, the plain language indicated that subsection (b)(3) did not apply unless a defendant had already received the initial pleading. For an "other paper" to trigger the thirty-day period, Rockwell must have received the "other paper" after or at least with the initial pleading. Since Rockwell received both the complaint and interrogatories on August 14, its removal by September 15 was timely.

Second, to establish removal jurisdiction under the federal officer statute, 28 U.S.C. § 1442(a)(1), Rockwell must establish: (1) it is a "person" within the meaning of the statute; (2) plaintiffs claims are based upon defendant's conduct "acting under" a federal office; (3) it raises a colorable federal defense, and (4) there is a causal nexus between the claims and the conduct performed under color of a federal office. While evidence established the first and third elements, the second and fourth elements were not established.

Regarding the second element, the declaration of Thomas F. McCaffrey stated that electrical components used on naval vessels were required to meet naval standards. The plaintiffs argued this did not establish that Rockwell acted under Navy direction in making the particular Allen-Bradley products to which they alleged exposure, because McCaffrey also stated that Allen-Bradley was not approved to provide certain products to the navy. The magistrate summarized this evidence as follows: "In other words, McCaffrey's Declaration shows that Rockwell generally did not supply asbestos-containing products to the Navy. However, if it did, Rockwell was acting under direct orders or detailed Navy regulations, even though such products were not approved by the Navy…the evidence presented fails to establish the 'acting under' requirement under the federal officer removal statute." Therefore Rockwell was not acting under a federal office. Further, the evidence was also insufficient to establish that the claims arose out of the direct orders or detailed regulations of the Navy, and the fourth element was not satisfied. Thus the magistrate recommended the court grant the plaintiffs' motion to remand.

Read the full decision here.

Diversity Jurisdiction Not Established Where Volkswagen Failed to Prove Fraudulent Joinder of Missouri Defendant

(U.S. District Court for the Eastern District of Missouri, May 26, 2016)

Nebraska plaintiffs filed an action in Missouri state court after the decedent died of mesothelioma. After five defendants remained, defendant Volkswagen filed for removal based upon diversity jurisdiction, and alleged that the defendant, J.P. Bushnell Packing Supply Company, a Missouri corporation, was fraudulently joined. This matter was before the court sua sponte to determine whether jurisdiction existed. Finding no jurisdiction, the court remanded.

Any doubts about the propriety of removal are resolved in favor of remand. In diversity jurisdiction, complete diversity exists where no defendant holds citizenship in the same state where any plaintiff holds citizenship. However, an action may not be removed if any of the parties in interest properly joined and served as defendants are citizens of the State in which such action is brought. Volkswagen argued that because J.P. Bushnell was fraudulently joined, its Missouri citizenship did not defeat diversity jurisdiction. Volkswagen based this argument on the fact that J.P. Bushnell had not filed any pleadings or other documents, had not appeared at hearings or depositions, and plaintiffs never sought default. However, the court, in remanding this case, stated: "Volkswagen cites no support for the novel proposition that a defendant's action or inaction proves a plaintiff fraudulently joined that defendant. Nor does Volkswagen offer authority holding that, where a plaintiff has pled a facially legitimate cause of action, fraudulent joinder is demonstrated by the plaintiff's conduct vis-à-vis that defendant during the litigation. Though plaintiffs' inaction with respect to J.P. Bushnell ultimately may affect their success against that defendant, it is a far cry from proving 'no reasonable basis in fact and law exists to hold the company liable."

Read the full decision here.

Cause Remanded to State Court After Federal Officer Defendants Dismissed

(U.S. District Court for the Eastern District of Missouri, May 19, 2016)

The plaintiff filed an asbestos suit in Missouri; defendant Crane Co. removed to federal court based on federal officer jurisdiction, in which Warren Pumps and CBS Corporation joined. All three defendants were dismissed and the plaintiff moved to remand, which the court granted. "…[I]f the federal party is eliminated from the suit after removal…the district court does not lose its…jurisdiction over the state law claims against the remaining non-federal parties…Instead, the district court retains the power either to adjudicate the underlying state law claims or to remand the case to state court." Here, no defendant objected, and the court saw no compelling reasons to retain jurisdiction. The court exercised its discretion and remanded the case to state court.

Read the full decision here.

Case Remanded Where GE Failed to Satisfy Requirements of Federal Officer Removal Due to Plaintiff's Specific Disclaimer of No Naval Asbestos Exposure

(U.S. District Court for the Southern District of West Virginia, Charleston Division, April 29, 2016)

In this case, the plaintiff claimed that he was exposed to asbestos and contracted mesothelioma from products allegedly manufactured, supplied, installed, and/or distributed by numerous defendants. The plaintiff asserted in the complaint that he served in the U.S. Navy from 1962–66 but provided the disclaimer that the "[p]laintiff was not exposed to asbestos and is not bringing any claim for exposure to asbestos-containing products during Plaintiff's service in the Navy."

One of the defendants, General Electric Company (GE), removed the case to the U.S. District Court for the Southern District of West Virginia pursuant to 28 U.S.C. § 1442(a)(1) on the basis that it had government contractor immunity for liability for injuries that may have resulted from the plaintiff's asbestos exposure from turbines, generators and other equipment on U.S. Navy vessels — to the extent that GE constructed or repaired them. The plaintiff subsequently filed a motion to remand, arguing that GE asserted a "non-existent claim" given the plaintiff's disclaimer related to his service in the Navy.

The court determined that a remand was appropriate because "federal officer removal must be predicated on the allegation of a colorable federal defense." Although certain federal courts have found that disclaimers did not defeat

removal where the disclaimers generally purported to waive federal claims, “federal courts have consistently granted motions to remand where the plaintiff expressly disclaimed the claims upon which federal officer removal was based.” The court explained that, in this case, the plaintiff disclaimed all of his claims arising out of his potential exposure while in the Navy, and GE did not assert that the plaintiff was exposed to any products GE provided to the Navy outside of the time period covered by the disclaimer. Accordingly, GE failed to satisfy the requirements for federal officer removal under 28 U.S.C. § 1442(a)(1).

Read the full decision here.

Federal Court of Appeals Vacates U.S. District Court Judgment Dismissing Two Defendants for Improper Joinder and Orders Remand of Mesothelioma Case

(U.S. Court of Appeals for the Fifth Circuit, April 19, 2016)

The plaintiff filed an action against multiple defendants for his alleged mesothelioma as a result of his occupational exposure to asbestos. The case was removed to federal court. Discovery took place over the course of eleven months. The plaintiff passed away and The defendant’s motion to dismiss was granted as the estate and family did not substitute plaintiffs. The family then filed a survival and wrongful death action in state court but added a new allegation that the plaintiff had been exposed to asbestos insulation while working at Poulan Chainsaw in Louisiana in the 1970s. The plaintiffs added two defendants, Graves Insulation and Taylor Insulation, who were alleged to have been non-diverse defendants who performed insulation contract work in Louisiana. The case was timely removed by co-defendant Georgia Pacific. Georgia Pacific argued that Graves and Taylor’s citizenship should be ignored as they were improperly joined and that discovery was ”substantially complete.” The plaintiffs moved for remand and in support added an affidavit from one of its attorneys that it was likely that the plaintiff’s exposure was caused by work at Poulan for which Graves and Taylor were responsible. At the hearing on remand, both sides relied on deposition testimony. In his first deposition, when asked about exposure at Poulan, the plaintiff stated “it is very possible.” However, in his second deposition he was asked about insulation of pipes and stated that he did not remember anyone doing insulation work at Poulan.

The Magistrate remanded to state court. The plaintiff appealed and the District Court on appeal, “pierced the pleadings”, and reversed finding that Graves and Taylor had been improperly joined. On appeal, the U.S. Court of Appeals first analyzed whether the order of the magistrate was a non-dispositive or dispositive matter, i.e., which standard of review would be used. Relying on *Gomez v. United States*, 490 U.S. 858, 863-64 (1989), the court concluded that the order of remand was dispositive and review would be de novo because “constitutional lines” were approached by the magistrate’s order and that in some instances a federal court may not review a case de novo during its entire time in federal court.

As for improper joinder, the court analyzed that improper joinder is available only through 1) fraud and 2) where “defendant has demonstrated that there is no possibility of recovery by a plaintiff against an in-state defendant.” In this case, the court was concerned with the latter. The court stated that the burden for improper joinder is a “heavy one” but did not agree with the plaintiff that the District Court had abused its discretion in looking at the discovery to determine the evidence in the case.

However, the court agreed with the plaintiffs’ contention that the District Court erred in finding improper joinder. In a lengthy analysis, the court stated that the standard for improper joinder is unlike summary judgment. Relying in part on *Smallwood v. Ill. Cent. R.R. Co.*, 385 F.3d 568 (5th Cir. 2004) (en banc), the court discussed that “lack of substantive evidence as to the non-diverse defendant does not support a conclusion that he was improperly joined even though that may support summary judgment.” In particular, the court recognized that most of the defendants’ arguments attacked the lack of the plaintiffs’ evidence thus far but had not “negated’ the possibility of liability on the part of Graves and Taylor. It made sense that the evidence in the first case would not have implicated Graves and Taylor because the plaintiffs had not added those two as parties. That lack of evidence did not render joinder improper.

Read the full decision here.

U.S. District Court Exercises Supplemental Jurisdiction and Denies Plaintiff's Motion to Remand

(U.S. District Court for the Eastern District of Louisiana, March 31, 2016)

In this case, the plaintiff, Frank Williams, brought an action in the Civil District Court for the Parish of Orleans for exposure to asbestos while working as a mechanical engineer for Lockheed Martin. Lockheed Martin removed the case to on the basis of a potential federal defense.

The plaintiff filed a motion to remand, but the court declined to decide the motion and transferred the case to the Eastern District of Pennsylvania for consolidation into the Multi District Litigation "MDL." Judge Robreno denied the motion to remand after the court determined Lockheed Martin had a government contractor defense pursuant to federal officer removal. The court granted Lockheed Martin's motion for summary judgment. The plaintiff's children were substituted as parties and moved to remand the case to the Eastern District of Louisiana citing that no outstanding motions were in the case and that the plaintiffs were ready for trial. Again, the plaintiffs moved to remand.

The plaintiffs contended that the court lacked subject matter jurisdiction for a lack of diversity since Lockheed was no longer a defendant in the case. The plaintiffs further argued that the court lacked subject matter jurisdiction because no federal questions remained to be determined. Additionally, the plaintiffs maintained that the court never had subject matter jurisdiction because Lockheed Martin could not establish its government contractor defense. Finally, the plaintiffs took the position that new case law in the Eastern District of Louisiana required the case to be remanded.

The court found many of the plaintiffs' arguments to be an "insult" to Judge Robreno. Specifically, the court stated that lack of diversity does not destroy subject matter jurisdiction. Although the plaintiff cited cases where the court was unable to maintain supplemental jurisdiction, the court pointed out that those cases involved claims where the basis for federal jurisdiction was absent. The instant case was based on valid federal jurisdiction of federal officer removal. Further, the court discussed that dismissal of federal claims does not negate subject matter jurisdiction. The court agreed with the plaintiff that no federal questions remained but pointed out that the plaintiffs failed to submit any authority that the court loses subject matter jurisdiction as a result. Although the court has the discretion to decline its exercise of supplemental jurisdiction, the court found it was not proper to do so in this case. The court relied on the decision in *Batiste v. Island Record Inc.,* 179 F.3d 217 (5th Cir. 1999). This case, like Batiste, had been pending for a long time, had dispositive motions granted, and dealt with no complex or "novel" issues. Accordingly, there was no reason for the court to not exercise supplemental jurisdiction. Further, the court found the plaintiffs argument that the Court never had subject matter jurisdiction to be "outrageous." The court noted in particular that the Eastern District of Pennsylvania had already decided the issue of subject matter jurisdiction on two occasions when the plaintiff motions to remand were previously denied. The court also cited that the "principle purpose of MDL is to avoid piecemeal litigation." Accordingly, the court found nothing justifying the plaintiffs request to vacate the prior decisions or remand.

Read the full decision here.

U.S. District Court for Northern California Grants Plaintiff's Motion to Remand Case Based on Untimely Diversity Jurisdiction Removal

(U.S. District Court for the Northern District of California, March 28, 2016)

The plaintiff brought an action for alleged development of mesothelioma as a result of asbestos exposure on April 15, 2014. After the plaintiff passed on July 7, 2015, his wife filed a second amended complaint, adding a wrongful death and survival claim on October 28, 2015. The defendant removed the case based on diversity jurisdiction and the plaintiff's moved to remand as untimely.

Although the removal statute requires removal within 30 days from date of service of the complaint, the defendant relied upon two arguments that removal was proper. First, the defendant contended that the amendment of the complaint adding the wrongful death and survival claims reset the clock for purposes of removal. The court was not persuaded and reminded that courts are to strictly construe against removal based on jurisdiction. In fact, the court cited the Ninth Circuit's decision in *McAtee v. Capital One*, F.S.B. 479 F.3d 1143 (9th Circuit 2007). *McAtee* explicitly stood for the proposition that an amendment does not change the commencement date of the action. As a second argument, the defendant relied upon cases including *Groom v. Bangs*, 153 Cal. 456 (1908), which held that adding a wrongful death claim is a new action. The court was not persuaded, and noted that the cases the defendant relied upon "pre-date amendments to California law that a personal injury action did not abate on a person's death." Each

case cited by the defendant that did not pre-date was clearly distinguishable from the case at hand. Although the defendant argued that California Code 583.10 requires trial to occur within 5 years after an action is commenced the court was still unpersuaded. The defendant relied upon *Brumley v. FDCC California, Inc.* 156 Cal. App. 4th 312, 67 Cal. Rptr. 3d 292 (2007), which held that a newly added wrongful death claim did not have to be tried within 5 years of the filing of the original complaint.

The court disagreed and found that the same reasoning did not apply. The injuries claimed in Brumley's wrongful death claim were different than those in the original complaint. The only issue at hand for the instant case was jurisdiction, federal or state, according to the court. Citing *McAtee* again, the court stated the Ninth Circuit "specifically rejected a relation back approach to determine when a case commenced." Moreover, the court concluded the defendant suffered no prejudice from remand as the facts remained the same. Accordingly, the court found the defendant's removal untimely and remanded to state court.

Read the full decision here.

Vague and Conclusory Evidence in Support of Federal Officer Removal Rights Insufficient, Case Remanded to California State Court

(U.S. District Court for the Central District of California, March 9, 2016)

The plaintiff in this case, the decedent's wife, alleged secondary exposure to her husband through asbestos brought home by the decedent's father while working as an aircraft mechanic on the base of the Army National Guard. Defendant The Boeing Company removed on federal officer grounds, and the plaintiff filed a motion to remand when four defendants remained — Pep Boys, Continental Motors, Goodyear Tire & Rubber, and IMO Industries. Goodyear was the only defendant which opposed the motion to remand. The court granted the plaintiff's motion and remanded the case back to state court.

While removal should be strictly construed in favor of remand, defendants asserting removal rights under the federal officer removal statute enjoy much broader removal rights. Liability for design defects in military equipment cannot be imposed on military contractors, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States. Goodyear argued it had a colorable federal defense because it was a government contractor. As stated by the Ninth Circuit, the government contractor defense essentially claimed "The Government made me do it." The evidence cited by Goodyear in support of this assertion consisted of one report of a former Navy commander and military historian; this was insufficient to show that the United States approved reasonably precise specifications, and the court provided a string of cases in support of this finding. First, Goodyear did not show that the cited specifications required the use of asbestos, and did not show that the Armed Forces considered the use of asbestos and chose to approve it.

Specifically, the court stated: "The McCaffery Report does state that '[a]ll materials used in the construction of aircraft and their components, if any, were furnished in accordance with U.S. Government specifications approved by the Armed Forces,' and that 'all materials used in military aircraft and their components were subject to a thorough review by the Armed Forces and specifically approved for use by the Armed Forces,' … However, these statements are too vague and conclusory to amount to a showing of reasonably precise specifications. … The Court cannot conclude the phrase Mr. McCaffery uses — 'thorough review' — suffices as competent proof that 'the government was involved in a decision to use asbestos or proof that the government and the contractor engaged in a 'continuous back and forth' review process regarding the defective feature.'… Similarly, the assertion that '[a]ll materials were either specified or approved by the U.S. Armed Forces,'… is similarly vague and conclusory and does not necessarily 'indicate anything beyond rubber stamping." Further, the voluminous specifications provided by Goodyear, without further explanation, was insufficient. "It is not the Court's task to 'scour the record' in search of competent evidence." Since Goodyear failed to meet the first element of the government contractor defense, the Court did not discuss the other elements.

Further, Goodyear's broad assertions regarding its contractor defense did not specify whether it followed specifications regarding warnings. Since Goodyear did not address this second element of the defense — whether it provided warnings required by the Air Force — Goodyear failed to prove that this defense was available for removal jurisdiction. Since there was no colorable federal defense, there was also no causal nexus for the design defect claims.

Read the full decision here.

Motion to Remand Granted Based on Supporting Documents Showing Asbestos Work of Non-Diverse Defendant and Early Stage of Discovery

(U.S. District Court for the Eastern District of Louisiana, March 4, 2016)

In this case, the plaintiff alleged exposure through his father's work close from 1953 through the 1970s. The plaintiff's father worked at the Exxon Baton Rouge facility. The plaintiff also claimed exposure to asbestos as an adult while working as a carpenter at various residential construction sites and as a contractor at Exxon between 1965 through 1978. Defendant Exxon removed the action to federal court based on diversity with the consent of defendants Georgia-Pacific, LLC and Union Carbide Corporation . The plaintiff subsequently moved to remand.

The court granted the remand. In its analysis, the court stated: "The removing party's burden of proving improper joinder is 'heavy.' In determining the validity of an allegation of improper joinder, the district court must construe factual allegations, resolve contested factual issues, and resolve ambiguities in the controlling state law in the plaintiff's favor.' In Smallwood v. Illinois Central Railroad Co., the Fifth Circuit articulated two avenues for determining whether a plaintiff has a reasonable basis for recovery under state law. First, '[t]he court may conduct a Rule 12(b)(6)-type analysis, looking initially at the allegations of the complaint to determine whether the complaint states a claim under state law against the in-state defendant. Ordinarily, if a plaintiff can survive a Rule 12(b)(6) challenge, there is no improper joinder.' Second, if the plaintiff has stated a claim and, as a result, survives a Rule 12(b)(6) challenge, but 'misstated or omitted discrete facts that would determine the propriety of joinder,' the court may 'pierce the pleadings and conduct a summary inquiry.' '[A]lthough the type of inquiry into the evidence is similar to the summary judgment inquiry, the district court is not to apply a summary judgment standard but rather a standard closer to the Rule 12(b)(6) standard.' 'The district court must also take into account 'the status of discovery' and consider what opportunity the plaintiff has had to develop its claims against the non-diverse defendant.'"

The court found that plaintiff's claims against Taylor-Seidenbach, Inc., a non-diverse defendant, did not fall under improper joinder. In support of his motion to remand, the plaintiff attached documents that supported his claims against Taylor-Seidenbach that it was seller, distributor, and installer of asbestos-containing products in Louisiana during the time period the plaintiff claims asbestos exposure. Regarding the status of discovery, the court held: "This action was filed in state court on August 25, 2015 and removed to federal court very shortly thereafter on October 21, 2015. It is likely that very little discovery has taken place to date, other than the taking of the Plaintiff's deposition for perpetuation purposes. Due to the fact that discovery remains in its infancy, the Court finds it appropriate to remand this case to state court, where the Plaintiff will have the opportunity to further investigate and develop his claims against Taylor-Seidenbach."

Read the full decision here.

Case Remanded to State Court to Hear Defendant's Motion to Dismiss on Personal Jurisdiction as State Court Issues Predominate Case

(U.S. District Court for the Central District of California, March 3, 2016)

In this case, the decedent Oscar Villanueva, is alleged to have been exposed to asbestos from various products while working at Glendale Auto Radio Stereo from 1969 to 1990. Defendant FCA US LLC removed the case to federal court since any judgment would have an impact on its bankruptcy estate. Defendant Dr. Ing. H.C.F. Porsche moved to dismiss arguing improper service of process and lack of personal jurisdiction. The plaintiff subsequently dismissed the claim against FCA and moved to remand for lack of subject matter jurisdiction. Porsche AG opposed.

The court granted the remand, and held: "The Court finds that state law issues predominate. Plaintiffs have only raised claims of negligence, strict liability, and loss of consortium, which are all governed by California law. Porsche AG's motion to dismiss alleges improper service of process, which Porsche AG concedes is a question of state law. Its motion to dismiss also asserts that the federal courts lack personal jurisdiction, which Porsche AG attempts to characterize as a federal due process question. The single personal jurisdiction question is insufficient for the Court to find that federal law issues predominate. Rather, state courts regularly handle issues of personal jurisdiction and such matters are not unsettled or complex, weighing in favor of a finding that state law issues predominate. Furthermore, the Complaint itself does not raise a substantial federal issue."

Read the full decision here.

Plaintiff's Motion to Remand Granted and Attorneys' Fees Awarded to Plaintiff; Defendant's Notice of Removal Both Substantively and Procedurally Improper

(U.S. District Court for the Northern District of California, March 2, 2016)

The plaintiff filed an action in California state court against various defendants after being diagnosed with malignant mesothelioma. Defendant O'Reilly Auto Enterprises removed to federal court after it was the only remaining defendant on the basis of diversity. The plaintiff filed a motion to remand and for attorneys' fees. The court granted the plaintiff's motion.

O'Reilly's notice of removal was both substantively and procedurally improper. A complaint that is not initially removable due to non-diversity may become removable where diversity arises due to a plaintiff's "voluntary action." The court cited case law, stating: "Voluntary action exists where the plaintiff voluntarily amends his pleadings or where the plaintiff agrees to voluntarily dismissal or nonsuit of the nondiverse defendants…But where the dismissal of a diversity-defeating defendant occurs involuntarily, such as dismissal on the merits over the plaintiff's opposition, that action does not become removable." In this case, defendants SRI and E.T. Horn destroyed diversity and were never formally dismissed, and the court had granted both these defendants' motions for summary judgment after the plaintiff opposed them. Further, although the plaintiff settled with SRI, there was no formal dismissal and a settlement was insufficient to confer removal jurisdiction without a dismissal.

The court also found that the notice of removal was procedurally improper because it failed to satisfy the rule of unanimity, which requires that all defendants join in removal. Finally, because "[n]o reasonable litigant in O'Reilly's position could have concluded that federal court was the proper forum in which to litigate Plaintiff's claims given the presence of two non-diverse defendants," it awarded the plaintiff $4,200 in attorneys' fees.

Read the full decision here.

District Court Relies on Plain Language of Forum-Defendant Rule in Denying Plaintiff's Emergency Motion to Remand

(U.S. District Court for the Eastern District of Louisiana, February 29, 2016)

The plaintiff filed an asbestos-related lawsuit in Louisiana state court. Defendant Honeywell filed a notice of removal on the basis of diversity, without knowing that its registered agent in Louisiana was personally served one day before filing the removal. At the time of removal, no other defendant had been served. The plaintiff filed a motion to remand, arguing that Honeywell could not remove because one of the defendants (Burmaster) was a resident of Louisiana. The plaintiff also argued Honeywell "jumped the gun" by removing before it was served.

Honeywell argued removal was not barred by the forum-defendant rule because Burmaster was not served at the time of removal, that service was effectuated on its agent prior to removal, and that service on the removing party is not a prerequisite to removal.

The court examined whether the forum-defendant rule barred removal. An action that is otherwise removable based on diversity may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought. 28 U.S.C. § 1441(b)(2). The court stated: "Based on the plain meaning of the statute then, Honeywell's removal of this matter does not violate the forum-defendant rule. While acknowledging that Honeywell's position has "garnered some support in other courts," Plaintiff maintains that this Court should ignore the "and served" language of the statute…This the Court cannot do." Further, a close review of the record showed that Honeywell was in fact served one day prior to removal. Thus, removal was procedurally proper in all respects.

Read the full decision here.

Case Remanded to State Court Despite Defendant's Claim Plaintiffs Acted in Bad Faith with Claims Against Non-Diverse Defendant

(U.S. District Court for the Northern District of California, February 24, 2016)

In this case, Asbestos Corporation, Ltd. (ACL) removed the action to federal court on the ground of diversity. The plaintiffs moved to remand, arguing that ACL removed the action past the one year deadline to do so. ACL responded that the missing of the deadline to remove is excused since the plaintiffs acted in bad faith by maintaining a claim

against a non-diverse defendant, J.T. Thrope & Sons, Inc. (JTTS), to prevent removal. The plaintiffs responded that they were active in prosecuting those claims in good faith.

The court remanded the action, and held: "The Court finds that ACL has not met its burden of showing that Plaintiffs acted with bad faith such that the untimely exercise of federal diversity jurisdiction is warranted. It is undisputed that Plaintiffs sued JTTS in good faith based on previous discovery in other litigation, as counsel for ACL agreed during oral argument. The issue is whether there is any evidence that Plaintiffs, at some point after suing JTTS but before the end of the removal period, decided to maintain their action against JTTS solely to destroy complete diversity. The only evidence of bad faith that ACL proffers is that Plaintiffs (1) failed to take meaningful formal discovery from JTTS and (2) agreed to voluntarily dismiss JTTS from the action after the passage of the removal deadline. Unrebutted, this evidence might be sufficient to show bad faith. But the Court need not reach that question because Plaintiffs have submitted a declaration from counsel and from their private investigator averring that they continued to search for an eyewitness that could save their case against JTTS. Under the circumstances, these affirmations by counsel and the investigator regarding their efforts to obtain the key evidence they lacked suffice to defeat Defendant's bad faith claim."

Read the full decision here.

Federal Court Remands Case to State Court Based on Plaintiff's Waiver of Federal Claims Against Removing Defendant

(U.S. District Court for the Northern District of California, February 12, 2016)

On June 15, 2015, plaintiffs Charles Ford and Carol Ford filed an action in the Alameda County Superior Court alleging state law claims for Mr. Ford's exposure to asbestos from numerous defendants. Defendant Foster Wheeler Energy removed the matter to federal court in November 2015 following Mr. Ford's testimony that he worked aboard the USS Oklahoma City while working for the Bethlehem Shipyards in the late 1960s. In December 2015, the plaintiffs filed a notice of waiver, which stated that they waive any claims against Foster Wheeler that arise out of Mr. Ford's exposure to asbestos at any military or federal jobsites or from U.S. military or other federal government vessels.

The court granted the remand holding: "This Court, other courts within this District, and courts within neighboring districts, have found similar disclaimers sufficient to eviscerate Foster Wheeler's grounds for removal."

Read the full decision here.

Federal Magistrate Judge Recommends Denial of Plaintiff's Motion to Remand in Two Cases Originating in Delaware

(U.S. District Court for the District of Delaware, February 5, 2016)

In two nearly identical cases from the District of Delaware, the magistrate judge issued a report and recommendation, recommending the denial of the plaintiffs' motion to remand to state court.

In the first case, the plaintiff husband and wife alleged that the husband developed mesothelioma through exposure to asbestos while serving as a boiler tender in the Navy, while working at the shipyard, and through personal automotive work. In the second case, the plaintiff husband and wife alleged that the husband developed mesothelioma through asbestos exposure sustained while serving as a fireman and boiler tender in the Navy. In both cases, defendant Foster Wheeler removed to federal court through the federal officer removal statute, and Westinghouse joined. Crane joined in the second case. Both sets of the plaintiffs moved to remand.

The defendants argued that the Navy exercised control and supervision over the design and manufacture of their products, such that the government contractor defense precluded state tort law liability. The plaintiffs argued that government specifications included the use of asbestos as an option, not a requirement, and the defendant could not prove by a preponderance of the evidence that either was entitled to removal.

The magistrate applied the standard that defendants must only put forth a "plausible colorable defense to meet the requirements of removal," and quoted prior case law: "Although the evidence provided by [the defendant] may ultimately prove insufficient to support its defense on the merits, the Court finds that Plaintiffs overestimate the

demands of § 1442 at this stage of the proceedings. To establish jurisdiction under § 1442, [the defendant] need not prove its defense but need only show that it has the underpinnings of a valid federal defense."

The defendants satisfied this standard and each element of federal officer removal jurisdiction, which were: (1) the defendant was a "person" within the meaning of the statue; (2) the plaintiff's claims were based upon the defendant's conduct "acting under" a federal office; (3) the defendant raises a colorable federal defense; and (4) there was a causal nexus between the claims and the conduct performed under color of a federal office." Foster Wheeler submitted three affidavits stating that the acts which formed the basis of the plaintiff's claims were performed pursuant to direct orders of the Navy. Westinghouse submitted copies of Navy shipbuilding specifications requiring asbestos insulation on turbines and boilers. Crane submitted affidavits showing that their valves were designed and manufactured according to Navy contract specifications. Foster Wheeler, Westinghouse, and Crane produced evidence showing the Navy approved design and manufacture specifications, and products were made in accordance with Navy requirements. Lastly, the defendants showed that the plaintiffs' claims rose directly from the Navy's specifications.

Read the first decision here. | Read the second decision here.

Other Remand/Removal Decisions:

- ### Federal Officer Jurisdiction

  - **Broad Interpretation of the Federal Officer Removal Statute Keeps Case Against Boeing in Federal Court**
    (U.S. Court of Appeals for the Third Circuit, November 22, 2016)

  - **Federal Court Denies Remand on Outer Continental Shelf Lands Act Jurisdiction and Dismisses Fraud Counts of Complaint**
    (U.S. District Court for Eastern District Of Louisiana, November 17, 2016)

  - **Fourth Circuit Upholds Summary Judgment on Substantial Factor Causation and Affirms Denial of Remand Based on Federal Officer Jurisdiction**
    (U.S. Court of Appeals for the Fourth Circuit, May 6, 2016)

  - **Defendant's Failure to Warn Boilermaker Employees in the Shipyard Itself Prohibited Federal Contractor Defense**
    (U.S. District Court for the District of Maryland, April 20, 2016)

  - **Federal Court of Appeals Remands Case for Determination of Colorable Federal Defenses Alleged by Shipyard**
    (U.S. District Court of Appeals for the Fifth Circuit March 22, 2016)

Statute of Limitations Decisions

Plaintiff's Claims Barred on Statute of Limitations Based on When She Learned of Her Injuries

(U.S. District Court for the Eastern District of Texas, Sherman Division, August 31, 2016)

Plaintiff Marci Jones filed suit claiming that, during the course of her employment, she suffered personal injuries from being exposed to asbestos, mold and dead animals. The plaintiff was employed by Noble Finance, who rented a commercial building from defendants Andy and Nancy Anderson. The plaintiff's suit against defendants includes claims for her personal injuries as well as loss of earning capacity and the cost of medical treatment.

The defendants filed a motion for summary judgment, asserting among other arguments, that the plaintiff's claims failed due the statute of limitations. In Texas, causes of action based on personal injury must be brought within two years of accrual, which is the day the person sustains the injuries. The Texas Supreme Court further addressed the discovery rule in that it is restricted to "to exceptional cases to avoid defeating the purposes behind the limitations statutes. This is applied when the nature of the injury is inherently undiscoverable and is "unlikely to be discovered within the prescribed limitations period despite due diligence." [Citation Omitted].

In this case, the plaintiff filed suit on June 6, 2014. Therefore, if her claims accrued prior to June 6, 2012, they are barred. In the plaintiff's opposition, she argued that she did not learn of her injuries until June 16, 2012 and that the discovery rule saves her claims.

The defendants submitted, among other pieces of evidence, the following in support of their statute of limitations argument: (i) the plaintiff spoke with an individual at the State of Texas Health Department regarding complaints and concerns for her health regarding the condition of the building she worked in and further stated that she told them their responsibility to have asbestos tests done by law on June 1, 2012; (ii) the plaintiff spoke with an individual at the U.S. Department of Labor Occupational Safety and Health Administration regarding complaints and concerns for her health regarding the condition of the building; and (iii) on an unspecified date in June, the plaintiff states that she inquired "in regard to the asbestos exposure" and "previous possible exposure."

The plaintiff did not dispute the legitimacy of these statements but instead argued that her claims did not accrue until she was diagnosed and that her letters evidence nothing more than "mere suspicion," which is not enough to trigger limitations.

The court ultimately disagreed and found that the plaintiff's written documents evidence something more than her entertaining subjective and unverified suspicions. The court emphasized that not only did the plaintiff state in May 2012 that her working conditions were making her sick, her medical records (and even her own expert report) indicate a lack of diligence on her part. According to the record, the plaintiff reported chest pain and discomfort during an emergency room visit in January 2011 (more than 3 years before she filed suit), and while the records do not indicate a suspicion of "toxic" substances, she attributed it to "stress at work." The court further held that this record evidences more than a mere suspicion, and reasonable minds could not differ that prior to June 6, 2012, the plaintiff had discovered that there was a causal connection between the plaintiff's health symptoms and her working conditions. For this reason, the court finds that the plaintiff's claims are barred by the statute of limitations.

Read the full decision here.

Summary Judgment Denied to Talc Defendant on Statute of Limitations, Burden of Proof, and Causation Issues

(Supreme Court of New York, New York County, June 22, 2016)

In this asbestos personal injury action the plaintiffs allege that Arlene Feinberg contracted mesothelioma because of exposure to asbestos-contaminated talc from defendant Colgate-Palmolive Company's Cashmere Bouquet. Colgate moved for summary judgment, arguing 1) the plaintiffs' action is barred by the statute of limitations; 2) the plaintiffs failed to exclude other potential causes of Ms. Feinberg's mesothelioma; 3) the plaintiffs failed to prove that Cashmere Bouquet caused the mesothelioma; and 4) that there is no evidence of general or specific causation. The plaintiffs opposed summary judgment, arguing that Colgate failed to prove that the action was time-barred because

Ms. Feinberg's symptoms were too isolated or inconsequential to trigger the statute of limitations. The plaintiffs further asserted that they did not bear the burden on summary judgment to exclude other potential causes of a plaintiff's illness. Rather, Colgate has the burden of proof on summary judgment to demonstrate that Cashmere Bouquet could not have caused the injury and it failed to do so. Finally, the plaintiff argued that the causation issue was foreclosed in prior decisions. The court agreed with the plaintiffs on all issues, and denied summary judgment.

On the question of whether the claims were time-barred, the court determined that the issue must be decided by the jury. The statute of limitations provides for a three-year limitations period for actions to recover damages for injuries to person or property caused by the latent effects of exposure to any substance or combination of substances, in any form, upon or within the body or upon or within property. That period is computed from the date of discovery of the injury by the plaintiff or from the date when through the exercise of reasonable diligence such injury should have been discovered by the plaintiff, whichever is earlier. For the purposes of the statute, discovery occurs when the injured party discovers the primary condition on which the claim is based. In review of the evidence, the court determined that "[t]he evidence does not permit me to decide the issue as a matter of law. While Mrs. Feinberg experienced many of the symptoms that one would experience with mesothelioma, those symptoms may have been attributable to other causes (like pneumonia or cardiomegaly). Therefore, here is an issue of fact as to whether the pain and effusion that she experienced prior to February 28, 2008 was in fact symptoms of malignant mesothelioma or, whether the symptoms related to another illness."

The court also rejected Colgate's argument that it was entitled to summary judgment because the plaintiff had not excluded other potential asbestos exposures and therefore, absent testing of the bottles of Cashmere Bouquet used by Ms. Feinberg, Plaintiffs could not prove a defect by circumstantial evidence. The court found the argument unpersuasive because it is not a plaintiff's burden on summary judgment to exclude all other potential causes of injury, it is a defendant's burden to establish a prima facie case of another cause before a plaintiff must raise an issue of fact. The court held that even though there was evidence that Ms. Feinberg was exposed to asbestos from tiles, secondhand smoke from her husband's Kent cigarettes, and lived near a waste dump, does not establish Colgate's entitlement to summary judgment.

Colgate argued that even if the plaintiffs could demonstrate that Ms. Feinberg was exposed to asbestos from Cashmere Bouquet talcum powder, there is no evidence that such exposure was a substantial factor in causing her disease because, Colgate claimed, the product was safe. The plaintiff countered with evidence of asbestos contamination in the product. The court held that Colgate's "argument is unpersuasive because it is not plaintiffs' burden on summary judgment to prove that exposure to Cashmere Bouquet was a substantial factor in causing Mrs. Feinberg's disease. Colgate has failed to meet its burden to demonstrate that Cashmere Bouquet "could not have contributed to the causation of plaintiff's injury." Colgate's argument was premised on its own conclusion that its product did not contain asbestos, or sufficient amounts of asbestos, to cause harm. The court, however, noted that the evidence is conflicting on this issue which raises issues of fact for the jury.

Finally, the court rejected Colgate's arguments that the plaintiffs could not show general or specific causation. The court rejected this argument as an attempt to re-litigate expert evidentiary issues that were previously decided by the court. The court agreed, noting that Judge Shulman's reasoning that a jury will have to weigh the evidence the parties are expected to present to decide whether [Colgate's] consumer talc product was in fact contaminated with amphibole asbestos in sufficient quantity to have been a substantial factor in causing decedent-plaintiff Feinberg's mesothelioma."

Read the full decision here.

Granting of Summary Judgment Upheld on Appeal; Court Rules Time to File Suit Began with Prior Diagnosis of Asbestosis Based on Virginia Statute of Limitations

(Superior Court of Pennsylvania, January 12, 2016)

The plaintiff in this case alleges that the decedent, Vincent Gatto, was exposed to asbestos while self-employed as a brick mason in Virginia. The decedent was diagnosed with asbestosis in 2003 and then with mesothelioma in 2010. The action was filed in 2011. Following the close of discovery, several defendants moved for summary judgment "based upon the Virginia statute of limitations, Va. Code Ann. § 8.01-243(A), which requires that an action for personal injury must be brought within two years after the cause of action accrues." The defendants argued that the cause of action accrued in 2003 when the decedent was first diagnosed with asbestosis. The lower court agreed and granted summary judgment. The plaintiff appealed that decision, arguing that the Virginia statute of limitations does not bar his claim.

The court upheld the granting of summary judgment by the lower court. Both parties agreed that pursuant to the Pennsylvania uniform statute of limitations on foreign claims act, 42 Pa.C.S. § 5521, the Virginia statute of limitations applies. The plaintiff argued that the statute of limitations did not begin to run in 2003 because the decedent was misdiagnosed with asbestosis. However, the court held: "Appellant does not dispute that Mr. Gatto was diagnosed with asbestosis in 2003. Also undisputed is that Dr. Miranda discussed the diagnosis with him. Clearly, too, Mr. Gatto was aware of the diagnosis, because he relayed that information to Dr. Everhart in 2005. These facts alone are sufficient to trigger the limitations period. Moreover, as the indivisible cause of action rule applies, the subsequent diagnosis of Mr. Gatto's mesothelioma did not commence a new limitations period. Accordingly, Appellant's cause of action is time-barred."

Read the full decision here.

Other Statute of Limitations Decisions:

- **Damages**
    - **Court Upholds Verdict in FELA Matter in Face of Limitations Argument But Vacates Damages Award and Remands**
      (Appellate Court of Illinois, Fourth District, October 18, 2016)

Statute of Repose Decisions

Court Affirms Summary Judgment in Part Regarding Turbines But Reverses in Part as to Switchgears by Same Manufacturer

(U.S. Court of Appeals for the Third Circuit, September 13, 2016)

The plaintiff brought his action on behalf of his decedent's estate alleging that Howard Frankenberger developed lung cancer as a result of his work around asbestos containing insulation on turbines at various powerhouses in Illinois and Indiana. The turbines were alleged to have been manufactured by Westinghouse. Howard Frankenberger worked as a pipefitter at State Line Generating Station, Will County Generating Station, and Acme Steel from approximately 1953-1999. As for exposure, he was allegedly exposed to asbestos from turbines and switchgears. Expert testimony established that the insulation found inside the turbines and required by Westinghouse until 1973 was taken out and during maintenance. Sometimes the insulation was placed back in. Other times, new insulation which may have been made by Westinghouse was used. The process created dust which was breathed by Frankenberger according to co-worker testimony. Additionally, it was alleged that Frankenberger was exposed to asbestos from switchgears also manufactured by Westinghouse. The switchgears contained an asbestos rope until 1977 and asbestos board until 1985. During maintenance, electricians used compressed air to blow off the dust which Frankenberger breathed.

The District Court granted summary judgment in favor of Westinghouse on both the issues of exposure to insulation and switchgears. The court concluded that there was no evidence that Frankenberger was exposed to the original insulation or that the replacement insulation contained asbestos. As for the switchgears, the court found that there was no evidence that the dust was from the switchgears. The plaintiff appealed that decision. The Appellate Court started its analysis with the standard for summary judgment which states that summary judgment is appropriate "if there is no genuine dispute as to any material fact." The court dispensed of Westinghouse's statute of repose argument and agreed that the statute may bar claims filed ten years after substantial completion of construction. However, Frankenberger's exposure occurred during maintenance and not during construction. Accordingly, the statute of repose was inapplicable.

As for the plaintiff's claims with respect to the turbines, the court pointed out that a "crucial" element was not established, i.e., whether the insulation being replaced was original to the turbine. The plaintiff had not established this fact and therefore summary judgment was affirmed. However, the court noted that although the dust from the

switchgears may have been from other sources it also was a reasonable inference that the dust came from the switchgear itself. The court relied upon the expert testimony that switchgears are likely to deteriorate. Accordingly, the court reversed on the issue of switchgear exposure.

Read the full decision here.

Appeals Court finds No Conflict of Laws and Reverses Dismissal Based on Alaska Statute of Repose

(Court of Appeals of Washington, Division Two, August 9, 2016)

Plaintiff Larry Hoffman filed suit in the Superior Court of Washington, Pierce County against numerous defendants alleging he developed mesothelioma from exposure to asbestos. Specifically, Hoffman is alleging take-home exposure from his father working as a welder for Ketchikan in Alaska in the 1950s and 1960s. Hoffman also alleges exposure from his own work at Ketchikan pulp mills in the 1960s and 1970s. Each mill featured steam turbines manufactured by General Electric (GE). Although it operated solely in Alaska, Ketchikan is a Washington corporation, having incorporated in 1947 before Alaska became a state.

Hoffman's suit included both Ketchikan and GE (among others) as defendants alleging theories of product liability and negligence. After extensive motion practice, the superior court ruled that a conflict of laws existed between Alaska's and Washington's respective statues of repose and concluded that Alaska law governed the case. Washington's statute of repose applies only to claims or causes of action brought against construction, engineering, and design professionals and does not contain any provision relating to personal injuries arising from non-construction claims. Both parties agree that under Washington's statute of repose, plaintiff's claim is not barred. Alaska's statute of repose does relate to personal injury actions but provides exceptions if the personal injury, death, or property damage resulted from (a) prolonged exposure to hazardous waste; (b) an intentional act or gross negligence; [(c) and (d) omitted]; and (e) a defective product.

As Alaska law was applicable, Ketchikan and GE moved to dismiss under CR 12(b)(6) because the Alaska statute of repose barred Hoffman's claim. Hoffman opposed arguing that Alaska's statute of repose did not apply, and even if it did, his case should survive due to several procedural exceptions. The superior court ultimately disagreed that any exception applied and granted defendants dismissal motion. On appeal, Hoffman argued that the trial court erred by ruling that there is a conflict of laws and that Alaska's statute of repose governs this dispute such that it bars his claim.

The Court of Appeals of Washington, Division Two, reviewed this dismissal de novo, and under CR 12(b)(6) standards, found that Hoffman had at least alleged facts that would (i) entitle him to relief; (ii) support a conclusion there is no conflict of laws; (iii) that Washington law therefore applies; and (iv) Hoffman's claims are not barred. The court found that the plaintiff had at least alleged facts that, if presumed true, could support application of the exceptions in the Alaska statute of repose. Accordingly, as neither Washington's statute of repose nor Alaska's statute of repose apply, there is no conflict of laws. As such, the Court of Appeals reversed the decision to dismiss and remanded the proceedings back to the superior court to be tried under Washington law.

Read the full decision here.

Insulation Found to be Integral to Turbine as Court Grants Renewed Motion for Summary Judgment Based on Statute of Repose

(U.S. District Court for the Northern District of Illinois, Eastern Division, July 21, 2016)

The plaintiff brought this action against defendants, including Westinghouse, for Earl Norberg, her decedent's, alleged development of lung cancer as a result of his work around asbestos containing products while working at the Joliet and Romeoville Power stations.

The plaintiff's fact witness was Mr. Norberg's brother, Howard, who recalled that he and the plaintiff worked at Joliet Power Station from 1963-65 and again in the mid-1970s. Specifically, he testified that workers were insulating a turbine at Unit 9 while Units 7 and 8 were being installed. The turbines were specially designed by Westinghouse for Joliet Power Station. As for the Romeoville site, the plaintiff was alleged to have worked there for approximately 8-12 months in the 1950s while installing handrail and rebar. Westinghouse supplied the Unit 1 turbine at Romeoville.

Westinghouse moved for summary judgment as to the statute of repose after the case had been transferred to the Multi-District Litigation. The court denied the motion and Westinghouse moved to renew its motion for summary judgment. Westinghouse argued that it was entitled to judgment as a matter of law based on the statute of repose. The statute bars claims arising from personal injury against a person "in the design, planning, supervision, observation or management of construction of an improvement to real property after 10 years have lapsed from the time of such act or omission. The court honed in on the two prong standard for the statute of repose. First, was the construction an improvement to real property and the second was whether the activity falls within the purview of section 13-214 (b) or the (ICSR). Here, the parties did not dispute that the activities undertaken by Westinghouse were improvements to real property. However, the plaintiff took the position that Westinghouse "as a supplier of asbestos insulation products is not protected under the ICSR, because the activity of selling or supplying construction products is not enumerated as one of the protected activities under the statute of repose." The court did not agree with the plaintiff and stated that the plaintiff failed to argue that Westinghouse supplied the insulation separate from the sale of its turbine. In fact, the record illustrated that the insulation was already installed and was "integral" to the turbines. Relying on *Illinois Masonic Med. Ctr. v. AC & S* and *Krueger v. A.P. Green Refractories Co.*, the court found that insulation was a part of the construction process and not a separate sale activity of Westinghouse to the power station.

The plaintiff also argued that summary judgment should be denied because Mr. Norberg was exposed to asbestos from maintenance and repairs during overhauls at the Romeoville Power Station in the late 1950s or early 1960s. The court agreed that overhaul work would not fall within the ambit of the statute of repose. However, the factual record showed that Westinghouse did not perform the overhaul work. Consequently, summary judgment was granted in favor of Westinghouse as to the statute of repose.

Read the full decision here.

Boiler Manufacturers Obtain Summary Judgment Based on Statute of Repose

(Circuit Court for Baltimore City, Maryland, May 27, 2016)

In this case, the decedent, Ralph Vitale, alleged exposure to asbestos from the installation of Burnham and Weil-McLain residential boilers during the course of his work through his own HVAC and plumbing business between 1966 and 1979. Defendants Burnham, LLC and Weil-McLain, a division of the Marley-Wylain Company, moved for summary judgment on the basis that no cause of action accrued against them pursuant to Maryland's statute of repose, codified at Sec. 5-108 of the Maryland Code, Courts and Judicial Proceedings article. Maryland's statute of repose provides that "no cause of action for damages accrues . . . when wrongful death, personal injury, or injury to real or personal property resulting from the defective and unsafe condition of an improvement to real property occurs more than twenty (20) years after the date the entire improvement first becomes available for its intended use."

The defendants argued: 1) that Mr. Vitale's injuries occurred more than twenty years after the alleged exposures to asbestos from the installation of their residential boilers because the last alleged exposure occurred in 1979 and Mr. Vitale was diagnosed with and died from mesothelioma in 2014, 2) that the residential boilers were improvements to real property because they were long-term fixtures to the residential structures, connected to the structures' gas and electrical systems, and were necessary for the use and enjoyment of the structures, and 3) that no exceptions to the rule applied, and therefore they were entitled to summary judgment as a matter of law. The court accepted these arguments, rejecting the plaintiff's suggestion that the rule did not apply because Burnham and Weil-McLain were manufacturers of asbestos containing products or were entities whose principal business was the supply, distribution, installation, sale or resale of products causing asbestos-related disease and were therefore entities that could not seek protection under the rule. The court also rejected the plaintiff's argument that Mr. Vitale's injuries occurred at the time of exposure and were therefore within the 20-year period.

This is the first instance in which a residential boiler manufacturer in an asbestos-related personal injury case has obtained summary judgment under Maryland's statute of repose.

Dismissal of Third-Party Complaint Brought by City of Phoenix Against Contractors and Developers Upheld on Appeal Based Upon Statute of Repose

(Court of Appeals of Arizona, Division One, May 19, 2016)

In 2013, Carlos Tarazon filed a lawsuit against the City of Phoenix, alleging that he developed mesothelioma as a result of asbestos exposure while performing pipe installation and other repairs for the city on projects that took place between 1968 and 1993. The city, in turn, filed a third-party complaint against the developers and contractors responsible for the planning, design and construction of the projects, seeking defense and indemnification pursuant to the construction contracts at issue and city ordinances incorporated within other development permits.

The third-party defendants moved to dismiss the complaint, asserting that the city's claims were barred by the Arizona statute of repose, which provides, in pertinent part, that an action based in contract may not be instituted against a person who "performs or furnishes the design, specifications, surveying, planning, supervision, testing, construction or observation of construction of an improvement to real property more than eight years after substantial completion of the improvement to real property." The trial court granted the motion, dismissing the city's third-party complaint.

On appeal, the city contended that it was exempted from the statute of repose based on law suggesting that limitations of actions do not apply to the State or its political subdivisions. The Court of Appeals flatly rejected this argument, finding that the plain language of the statue dictates that it applies to all actions based in contract, including the permits forming the basis of the city's claims.

Read the full decision here.

Section 2 of the Indiana Product Liability Act Statute of Repose Found Unconstitutional

(Supreme Court of Indiana, March 2, 2016)

In this federal court case, three appeals regarding the constitutionality of the Indiana product liability act statute of repose were consolidated for review. Several defendants moved for summary judgment based on the statute of repose in each of the cases with various results. The plaintiffs now argue that section 2 of the statute draws a constitutional impermissible distinction between asbestos plaintiffs who have claims against defendants who both mined and sold raw asbestos and asbestos and those asbestos plaintiffs that have claims against defendants that did not fall into that category.

In its analysis, the court looked at prior rulings, including *AlliedSignal v. Ott*, *Collins v. Day*, and *Covalt v. Carey Canada, Inc.*, and sections 1 and 2 of the statute. The court noted: "Section 2 creates disparate treatment for the classes at issue here. Those asbestos victims who are injured by defendants who did not both mine and sell raw asbestos must sue those defendants under Section 1, where they may be barred by the statute of repose. The asbestos victims who are injured by defendants who did both mine and sell raw asbestos, however, may sue those defendants under Section 2, where no statute of repose applies. Because there is disparate treatment, *Collins* requires first that any disparate impact 'be reasonably related to inherent characteristics which distinguish the unequally treated classes,' and second, that preferential treatment be uniformly applicable and equally available to all persons similarly situated.' 644 N.E.2d at 80. Section 2 does not satisfy this burden."

The court went on to hold: "While we decline to reconsider our decision in *AlliedSignal v. Ott*, we find that Section 2 of the Product Liability Act violates the Indiana Constitution. Applying this Court's precedent in *Covalt v. Carey Canada, Inc.*, we uphold our prior decision that the Indiana Product Liability Act's statute of repose does not apply to cases such as these where the plaintiffs have had protracted exposure to inherently dangerous foreign substances. We affirm the trial courts' denial of summary judgment in General Electric Co. and Owens-Illinois, Inc., and we reverse the trial court's grant of summary judgment in Crouse Hinds. We remand for further proceedings in accordance with this opinion."

Read the full decision here.

Work Performed by Insulation Contractor was Maintenance, Not Improvement, to Real Property; Wisconsin Statue of Repose Did Not Bar Asbestos Claims

(*U.S. District Court for the Eastern District of Wisconsin, January 6, 2016)*

In a follow-up decision from yesterday's report regarding the summary judgment granted to Foster Wheeler, Sprinkmann Sons Corporation also moved for summary judgment. The Wisconsin federal court denied this motion.

The decedent was a steamfitter; two co-workers testified regarding their work with the decedent at various industrial facilities. They overhauled turbines and tanks, and removed/installed insulation. Sprinkmann was an insulation contractor for at least two of these facilities and moved for summary judgment based on: (1) no evidence Decedent was exposed to Sprinkmann asbestos-containing products; (2) Wisconsin's construction statute of repose; and (3) lack of evidence regarding punitive damages.

First, regarding causation, the court provided an extensive review of the evidence presented in holding that that there was enough evidence to suggest that Sprinkmann performed work for at least two of the sites testified to by the co-workers. Second, the Wisconsin statute of repose precludes claims for injury brought more than ten years after the date of substantial completion of an improvement to property. There is an exception for claims brought due to damages resulting from negligence in the maintenance, operation or inspection of an improvement to real property. The court found that: "…on this record, the court cannot definitively say that Sprinkmann's work constituted an improvement rather than repair or maintenance. Because the purpose of the statute of repose is to protect contractors who are involved in permanent improvements to real property, the statute of repose does not apply to bar Ahnert's action." Third, the court found that the plaintiff created a genuine issue of material fact regarding notice of asbestos-related dangers; Sprinkmann's owner and son died of mesothelioma by the late 1960s, Sprinkmann had access to literature identifying asbestos as a toxic substance, and Sprinkmann employees filed workmen compensation claims for asbestos diseases since 1956. However, a ruling on this matter was premature.

Read the full decision here.

Summary Judgment Decisions

Summary Judgment for Brake Manufacturer Reversed as Circumstantial Evidence of Exposure Sufficient to Show Triable Issue of Fact

(Court of Appeal of California, Second Appellate District, December 7, 2016)

The plaintiffs, wife and sons of Henry Linsowe, filed a complaint in 2011 alleging causes of action for negligence, strict liability, and loss of consortium. In their complaint, the plaintiffs alleged that Linsowe worked as a brake mechanic at Downey Ford from 1969 to 1986 and that he was exposed to asbestos "during various activities, including handling, beveling, removing, cutting, scoring, grinding, shaping, drilling, and installing of asbestos-containing brake pads and shoes, and the use of compressed air to clean and remove asbestos dust from brake drums and assemblies." Defendant Honeywell International, Inc., successor-in-interest to The Bendix Corporation was added to the plaintiffs' complaint as a Doe defendant in March 2014.

Honeywell moved for summary judgment contending that the plaintiff's evidence was insufficient to establish that Linsowe had been exposed to Bendix products. Honeywell argued, "Here, there is no admissible or reliable evidence of decedent's exposure to an asbestos-containing product manufactured by Honeywell. . . . None of the persons identified by plaintiffs as a witness (as well as all persons deposed to date) could provide competent testimony that decedent used a Bendix brake." As a result, Honeywell argued, the plaintiffs "cannot prove causation—a critical element for all their claims." Honeywell pointed to the plaintiff's inability to produce documents supporting their allegations and depositions of co-workers and a Ford person most knowledgeable which suggested a lack of direct evidence that Mr. Linsowe worked on Bendix products on a specific vehicle at a specific time. Critically, Honeywell emphasized that Ford also used brake products supplied by other manufacturers which were repackaged before supply to dealers such as Linsowe's employer.

The plaintiffs opposed Honeywell's motion arguing that Honeywell failed to meet its burden under Code of Civil Procedure section 437c (section 437c) to demonstrate that the plaintiffs' causes of action had no merit. The plaintiffs

argued that Honeywell's insistence on direct evidence was misguided: "The fact that Mr. Linsowe's heirs cannot personally identify a specific day, on which a specific Ford vehicle, with a specific VIN number, was worked on by Mr. Linsowe that contained Bendix asbestos brake products does not form the basis for a summary adjudication." The plaintiffs also argued that the evidence they submitted in opposition to the motion demonstrated a triable issue of fact. According to the plaintiffs, brake mechanics such as Linsowe are exposed to asbestos when working on existing brakes installed in vehicles, and also in preparing and installing replacement brakes. The plaintiffs submitted deposition testimony from witnesses suggesting various makes and models of vehicles that Mr. Linsowe worked on and that Bendix brakes were used on the various models.

The trial court held a hearing and granted Honeywell's motion for summary judgment holding that Honeywell shifted the burden under section 437c by demonstrating that the plaintiff's evidence does not show specific exposure to Bendix brakes. The trial court also rejected supplemental filings made by the plaintiff after the hearing.
The plaintiff appealed from that ruling arguing that Honeywell failed to shift the burden on summary judgment, and therefore its motion should have been denied. The plaintiffs contended Honeywell failed to carry its burden because it focused only on the lack of direct evidence of exposure, ignoring inferences that can be drawn from circumstantial evidence. The plaintiffs argued, "Honeywell asked the trial court to entertain only direct evidence, namely a witness or authenticated photograph that shows Mr. Linsowe working on a specific day on a specific vehicle replacing a specific brake shoe. Honeywell ignores the equivalent value of circumstantial evidence and Plaintiffs' right to all reasonable inferences that can be drawn from the available evidence." The court disagreed, finding that Honeywell had met their initial burden to show that the plaintiffs were unable to establish that Linsowe had been exposed to Bendix brakes because a defendant moving for summary judgment "may show through factually devoid discovery responses that the plaintiff does not possess and cannot reasonably obtain needed evidence."

However, the court found that the plaintiffs still met their burden to show a triable issue of material fact as to exposure. Although the plaintiffs lacked direct evidence, they argued that with their circumstantial evidence a trier of fact reasonably could infer that at least some of the brake work Linsowe did at Downey Ford in the 1970s involved brakes manufactured by Bendix, thereby exposing Linsowe to asbestos from Bendix products. On review, the vourt concluded that the evidence was sufficient to show that a trier of fact reasonably could conclude that Linsowe handled Bendix parts at Downey Ford. As such, the judgment in favor of Honeywell was reversed.

Read the full decision here.

No Duty to Warn Third Parties for Take-Home Exposures in Georgia

(Supreme Court of Georgia, November 30, 2016)

On November 30, 2016, the Georgia Supreme Court issued a ruling, that affirmed in part and reversed in part, a Georgia Court of Appeals decision, which was previously reported on in the ACT.

For a brief background, the plaintiff, Marcella Fletcher originally filed suit against CertainTeed after being diagnosed with malignant pleural mesothelioma. Fletcher attributed this diagnosis to years of laundering her father's asbestos dust covered work clothing to which she alleges CertainTeed manufactured the asbestos-laden water pipes that her father had worked with. In her complaint, Fletcher alleged negligent design and negligent failure to warn.

The trial court granted CertainTeed's motion for summary judgment and found that the plaintiff failed to establish sufficient evidence with respect to both allegations. The Georgia Court of Appeals reversed on both accounts to which the Georgia Supreme Court granted certiorari review.

On appeal, the Court of Appeals concluded that CertainTeed had failed to demonstrate, as a matter of law, the absence of evidence that its product was defectively designed. Here, the court applied the "risk-utility analysis," which incorporates the concept of reasonableness, i.e., whether the manufacturer acted reasonably in choosing particular *product design*, given the probability and seriousness of the risk posed by the design, the usefulness of the product in that condition, and the burden on the manufacturer to take the necessary steps to eliminate the risk. With the adoption of this analysis, the burden is placed on the defendant, in seeking summary judgment, to show plainly and indisputably an absence of any evidence that a product as designed is defective [Citation Omitted]. CertainTeed did not challenge this conclusion and, accordingly, the Georgia Supreme Court affirmed the Court of Appeals decision in that CertainTeed failed to carry this burden and the reversal of the grant of summary judgment was correct.

The Court of Appeals also found a jury question existed as to whether CertainTeed had a duty to warn. In reaching this conclusion, although the court recognized that Fletcher would not have seen any warning label placed on CertainTeed's products, it nevertheless concluded that a warning could have permitted her father to take steps to

mitigate any danger posed by the asbestos dust on his clothing. Upon review, the Georgia Supreme Court found this conclusion problematic. The Supreme Court explained, in failure to warn cases, the duty to warn arises whenever the manufacturer knows or reasonably should know of the danger arising from the use of its product and that duty requires warnings of nonobvious foreseeable dangers from the normal use of its products. Generally, this duty to warn may be owed to consumers, reasonably foreseeable users and purchasers of the product. This duty has also been extended, in some cases, to reasonably foreseeable third parties. However, the existence of a duty to warn, the determination of which is a legal question, is not resolved exclusively on the basis of foreseeability, and other factors are considered. The court noted, in fixing the bounds of duty, not only logic and science, but public policy play an important role. In other words, to impose a duty that either cannot feasibly be implemented or, even if implemented, would have no practical effect would be poor public policy. [Citation Omitted].

Taking into consideration this public policy factor, the Georgia Supreme Court was disinclined to conclude that that CertainTeed owed a duty to warn third parties based on the fact that, in *this* case, such a warning *may* have been effective. Therefore, the court found it unreasonable to impose a duty on CertainTeed to warn all individuals in Fletcher's position, whether those individuals be family members or simply members of the public who were exposed to asbestos-laden clothing, as the mechanism and scope of such warnings would be endless. Accordingly, the Georgia Supreme Court that CertainTeed owed no duty to warn Fletcher regarding the dangers of the asbestos dust and, thus, that the Court of Appeals erroneously reversed the trial court's grant of summary judgment to CertainTeed with respect to Fletcher's duty to warn claim.

Read the full decision here.

Same Facts = Same Ruling? Nope! Baltimore Issues Grant and Denial of Summary Judgment In Two Groups of Smoking Lung Cancer Cases

(Circuit Court for Baltimore City, November 29, 2016)

Two opposing decisions were rendered by two different judges in two factually and legally similar groups of smoking lung cancer cases. In *Harrell et al.* and *Boston et al*., asbestos defendants filed nearly identical motions for summary judgment, arguing that the plaintiffs could not recover because (1) the plaintiffs knew the hazards of smoking and assumed the risk, and (2) were contributorily negligent. Summary judgment was granted in one group (*Harrell et al*.) and denied in the other (*Boston et al*.).

In Maryland, in order to assert the affirmative defense of assumption of risk, defendants must show that the plaintiff (1) had knowledge of the risk of the danger; (2) appreciated the risk; and (3) voluntarily confronted the risk of danger. In order to assert the defense of contributory negligence, it must be demonstrated that the injured party acted with knowledge and appreciation, either actual or imputed, of the danger of injury which their conduct involved.
In *Harrell et al*., the court found that the defendants presented substantial evidence that the addictiveness of cigarettes was common knowledge for decades and cited information in support. The link between smoking and lung cancer was common knowledge since the 1950s. Likewise, Maryland courts have concluded that the ordinary consumer was aware of smoking hazards since the 1950s. The plaintiffs failed to show an absence of general public awareness of these hazards; although the tobacco industry had a substantial role in shaping public awareness, the existence of information downplaying the dangers of smoking did not undermine the ordinary consumer's ability to contemplate the dangers of smoking. Further, the defendants presented substantial evidence that plaintiffs voluntarily confronted the risks associated with smoking. Despite warning labels since 1965, the plaintiffs continued to smoke and there was no question of fact as to whether plaintiffs voluntarily confronted the risks related to smoking. Since lung cancer was a single, indivisible injury incapable of apportionment, apportioning causation or damages between smoking and asbestos was impermissible; since the plaintiffs' smoking caused some portion of lung cancer, they were barred from recovery.

In *Boston et al*., the court was persuaded by the plaintiffs' argument that they did not assume the risk of lung cancer because the causal connection between smoking and lung cancer was not common knowledge; further, even if the causal connection was common knowledge, the synergistic effect of smoking and asbestos exposure was not, thus plaintiffs could not knowingly assume the risk or contributed to their increased chances of contracting lung cancer. Summary judgment was not appropriate because there was a genuine dispute of material fact concerning plaintiffs' knowledge about the danger of lung cancer and smoking. Further, the defenses of assumption of risk and contributory negligence both required factual determinations about plaintiffs' level of knowledge and appreciation of the increased risk, and when the plaintiffs acquired the knowledge that smoking caused lung cancer. The court summarized the conflicting information presented by plaintiffs and defendants as to when it was common knowledge that smoking caused lung cancer in support of its finding that when the dangerous nature and effect of smoking became common knowledge was far from indisputable. Further, assuming that plaintiffs did have knowledge,

summary judgment still failed because the plaintiffs did not have knowledge of the synergistic relationship between smoking and asbestos. The court recognized the lack of Maryland precedent on the issue of synergy, but pointed to other federal courts which have found that there was no assumption of risk or contributory negligence unless plaintiffs were warned or made aware of the dangers of smoking and the synergistic role played by dual exposure to tobacco and asbestos. Summary judgment was denied.

It remains to be seen which of these conflicting opinions will become Maryland precedent.

Read the *Harrell* decision here.| Read the *Boston* decision here.

Granting of Summary Judgment to Asbestos Insulation Supplier Based on Government Contractor Defense Upheld on Appeal

(Court of Appeal of California, First Appellate District, Division One, November 22, 2016)

In this case, the plaintiff, Gary Kase, claimed exposure to asbestos insulation used in Navy nuclear submarines during the 1970s. Defendant Metalclad Insulation Corp. provided the asbestos-containing insulation, Unibestos, to the U.S. Navy. Metaclad moved for and was granted summary judgment based on the government contractor defense. The plaintiff appealed.

On appeal, the court thoroughly reviewed the standards for summary judgment based on the government contractor defense pursuant to the seminal case *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988). Boyle set forth a three prong test for granting summary judgment: "(1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States." The court upheld summary judgment, outlining that while the government specifications did not expressly call for asbestos-containing insulation, they could only be met with the asbestos product. The court also highlighted that the Navy had for decades studied the health hazards of asbestos and continued to expressly approve of Unibestos.

Read the full decision here.

Pump Manufacturer's Motion for Summary Judgement Denied Because Burden of Proof Unsatisfied

(Supreme Court of New York, New York County, October 27, 2016)

Plaintiffs Patrick and Joy Demartino brought suit against various defendants after Patrick Demartino developed mesothelioma. Defendant Aurora Pump Company moved for summary judgment, arguing that it did not use or sell external asbestos-containing gaskets. The court denied this motion.

It was undisputed that during the plaintiff's time of alleged exposure to Aurora pumps while working at Walker-Prismatic from 1975-1986, Aurora used and sold asbestos-containing gaskets. The plaintiff testified that his only source of asbestos exposure from Aurora pumps was from replacement of external flange gaskets. However, in support of its motion, Aurora submitted an affidavit stating that external flange gaskets never contained asbestos. The plaintiff argued this affidavit should not be considered, because affiant did not work at Aurora until one year after the plaintiff's employment at Walker-Prismatic. The plaintiff further argued the motion should be denied because Aurora failed to provide discovery.

The court denied Aurora's motion. Case law supported that "pointing to gaps in an opponent's evidence is insufficient to demonstrate a movant's entitlement to summary judgment." To defeat summary judgment, the plaintiff's evidence must create a "reasonable inference" that the plaintiff was exposed to a product; issues of credibility were for the jury. Here, Aurora failed to demonstrate that its pumps could not have contributed to the causation of the plaintiff's injury. Further, Aurora could not satisfy the summary judgment burden of proof when it is undisputed that millions of documents exist that have not been turned over.

Read the full decision here.

Affidavits Executed by Decedent Containing Product Identification Admissible Under Dying Declaration Hearsay Exception

(Superior Court of Rhode Island, November 2, 2016)

Decedent John Pisano executed three affidavits regarding Sears products after he was diagnosed with mesothelioma; he died three months after his diagnosis and was never deposed. The affidavits detailed the decedent's use of floor tile, ceiling tile, and mastic purchased from Sears. Defendant Sears, Roebuck and Co. moved for summary judgment on various bases. The plaintiff presented these three affidavits in opposition to Sears' summary judgment motion. The court denied the motion for summary judgment.

Sears argued the plaintiff could not demonstrate any causal connection between the decedent's condition and the Sears products at issue, since at that time Sears sold different tiles. Further, the affidavits were inadmissible hearsay that were not executed with a sense of impending death in order to meet the dying declaration hearsay exception. Sears further argued it was exempt from liability due to Rhode Island's statute of repose, and the facts of this matter fit the statute's definition of improvement to real property such that no liability could attach.

The court analyzed Rhode Island rules of evidence to determine whether the affidavits were admissible. In doing so, it considered whether the decedent's belief of impending death was sufficient to allow for the dying declaration hearsay exception. Rhode Island case law suggested that "no time limit applies in terminal illness cases when analyzing the definition of 'impending.'" Here, the court was satisfied that decedent was fully aware of the terminal nature of his illness, such that the affidavits were admissible as an exception to hearsay.

Next the court analyzed whether the plaintiff provided sufficient product identification, since Sears argued it sold two identical tiles during the time of the decedent's alleged exposure. The court looked to Massachusetts law for guidance in how a plaintiff might sufficiently allege contact with a defendant's asbestos-containing product; these included: affidavits with a particular or specific date or range of contact, the proximity and frequency of any contact, and any witnesses who could support contact with the product. Applying these factors, the court found that the plaintiff alleged sufficient identification; sworn affidavits from a source with personal knowledge was sufficient to overcome product identification requirements at the summary judgment stage.

Finally, the court addressed the statute of repose argument. The intent of the legislature, and Rhode Island law, did not allow for application of this statute to the facts contained in this matter.

Read the full decision here.

Motion for Reconsideration Denied for Defendant's Failure to Put Forth Necessary New Evidence

(U.S. District Court for the Northern District of New York, October 27, 2016)

The plaintiffs brought this action against multiple defendants including Foster Wheeler and Crane Co. for injuries allegedly sustained while Mr. Osterhaut served in the U.S. Navy onboard the USS Roan.

Summary judgment was denied as to both Foster Wheeler and Crane. Crane filed the instant Motion for Reconsideration. The court noted that reconsideration is appropriate only when 1) and intervening change in controlling law took place 2) new evidence is available and 3) the need to correct clear error of law is present. Additionally before the court was Crane's motion to amend noting that maritime law governed this claim. Crane expressed concern that the court continued to discuss New York law thereafter even though maritime law applied. The court was unpersuaded by Crane's argument and found it an attempt to re-litigate the issue at hand. As for the motion for reconsideration, Crane argued that the court had not considered its recent decision in Dandridge which "distinguished the Quirin holding." The court pointed out that it is not bound by the decisions from the District Court of South Carolina or the Northern District of Alabama. Accordingly, Crane's contentions were not a basis for reconsideration.

More importantly though, the court noted that Crane had not brought forth any new evidence. On the contrary, the plaintiff presented evidence that Crane knew its valves came with asbestos components that would deteriorate and potentially expose a sailor like Mr. Osterhaut.

Accordingly, the court denied the Motion for Reconsideration.
Read the full decision here.

Third Circuit Reverses Summary Judgment for Switchgear Manufacturer and Remands

(U.S. Court of Appeals for the Third Circuit, October 26, 2016)

Carol J. Zellner, on behalf of the estate of Clifford R. Zellner, appealed the U.S. District Court for the Eastern District of Pennsylvania's order granting summary judgment in favor of CBS Corporation to the U.S. Court of Appeals for the Third Circuit, arguing that the district court erred in finding that she failed to establish a genuine dispute about whether Westinghouse Electric Corporation (predecessor to CBS Corporation) switchgear had deteriorated and exposed her now deceased husband to asbestos-containing dust. The Court of Appeals agreed, and reversed and remanded.

The Court of Appeals recently examined this same issue in *Frankenberger v. CBS Corporation*, which is found to be precedent controlling its analysis here. Although *Frankenberger* applied Indiana substantive law, the court said that for its purposes Indiana's causation law did not meaningfully differ from the Wisconsin law it applied to the instant appeal. Under Wisconsin law, the test for causation is "whether the defendant's negligence was a substantial factor in contributing to the result." In *Frankenberger*, the court partially reversed the district court's grant of summary judgment in favor of CBS and found that a jury could reasonably infer that MFrankenberger, the employee plaintiff, had been exposed to respirable asbestos dust from CBS switchgear. Like Mr. Zellner, Mr. Frankenberger worked as a pipefitter and alleged that he was exposed to asbestos-containing dust from CBS switchgear. Neither plaintiff worked directly with CBS switchgear, but both worked in close proximity to the same equipment for decades. In support of his claim that CBS switchgear was the source of the asbestos that he was exposed to, Mr. Frankenberger presented expert testimony that "the switchgear's asbestos-containing parts would likely deteriorate and release asbestos dust during maintenance." The court relied on that evidence in ruling in Mr. Frankenberger's favor.
The court explained that the *Frankenberger* holding was conclusive on its analysis of Mrs. Zellner's proffer of substantially equivalent evidence. The district court ffound that Mrs. Zellner presented evidence that Mr. Zellner was exposed to respirable dust blown out of CBS switchgear boxes and that CBS switchgear contained asbestos. However, it concluded that she failed to present sufficient evidence that the CBS switchgear at Fort Howard was deteriorated and released asbestos-containing dust. The Third Circuit disagreed, stating that "given our holding in *Frankenberger*, we hold that Mrs. Zellner's evidence of deterioration and asbestos exposure was sufficient to survive summary judgment."

The court rejected CBS' central argument to the contrary that Mrs. Zellner failed to introduce first-hand testimony or other factual support for the assertion that the switchgear around Mr. Zellner was in a deteriorated condition. The court said that argument ignored the extensive evidence in the form of expert testimony that switchgear deteriorates over time due to normal operation and cleaning and an internal CBS memorandum which explicitly states that cleaning switchgear components could cause asbestos to become airborne. The Third Circuit said it was "precisely this type of evidence that defeated CBS' motion for summary judgment in *Frankenberger.* The evidence here is no less compelling." Therefore, the court concluded that a reasonable jury could find that Mr. Zellner was exposed to asbestos-containing dust from CBS switchgear and that it was a substantial factor in his fatal illness.
The Asbestos Case Tracker first addressed the *Frankenberger* decision in September 2016.

Read the full decision here.

Pump Manufacturer Granted Summary Judgment for Plaintiff's Failure to Establish Sufficient Exposure

(U.S. District Court for the Southern District of New York, October 19, 2016)

Plaintiff-Decedent William Holzworth filed suit against various defendants in the New York Supreme Court on July 9, 2012 alleging personal injuries pursuant to his diagnosis of mesothelioma allegedly caused by his occupational exposure to asbestos. Specifically, Holzworth alleged exposure to asbestos-containing products during this employment, both as a sonarman serving in the U.S. Navy between 1952 and 1955, and as a construction and project manager between 1963 and 2007. The defendants removed this action to the U.S. District Court for the Southern District of New York on August 9, 2012 pursuant to 28 U.S.C. § 1442(a)(1), which provides for federal jurisdiction in cases involving persons acting under the direction of a federal officer.

During the discovery deposition, Holzworth testified that he encountered one Burnham product while cleaning and rebuilding a fire-damaged house in New Jersey. Holzworth initially identified the product as a Burnham heater, but on cross-examination, he clarified that the pump connected to the heater, and not the heater itself, said "Burnham." A metal jacket encased the heater with insulation that Holzworth believed to be asbestos. Holzworth also observed

"asbestos-wrapped pipes" connected to the top of the heater, which were wrapped in "white material," to which he assumed to be asbestos. Holzworth personally dismantled the heater and the pump connected to it, dragged them out of the house, and personally handled the white material from the inside of the metal jacket and the top of the heater. Further, he swept up the debris from the heater, which he admitted was mixed with the general mess produced by the fire. The total removal of this Burnham product took between one and three hours.

Burnham moved for summary judgment on March 22, 2016, asserting that New Jersey law is applicable and that there is no genuine dispute as to any material fact so that (1) the plaintiff failed to establish that the heater with its allegedly asbestos-containing insulation was manufactured by Burnham and, in any event, (2) Holzworth's single exposure of one to three hours was not a substantial factor causing his illness. The plaintiff did not oppose this motion.

In providing a decision and analysis to this motion, the court emphasized when a summary judgment motion is not opposed, the motion is not granted automatically. The curt must examine the moving party's submission to determine if it has met its burden of demonstrating that no material issue of fact remains for trial. The court must further determine whether any material facts are genuinely disputed in the record presented on the motion, then assure itself that the facts as to which there is no genuine dispute show that the moving party is entitled to a judgment as a matter of law. If the evidence submitted in support of the motion does not meet the movant's burden, or if the undisputed facts do not show that the movant is entitled to judgment as a matter of law, then summary judgment must be denied even if no opposing evidence is presented.

After reviewing Burnham's motion for summary judgment, this court provided analysis as to whether New York or New Jersey law applies, and whether exposure to defendant's product proximately caused Holzworth's injuries. A federal court sitting in diversity in New York applies New York choice of law rules. New York's choice of law rules direct the court to consider first whether an actual conflict exists between the laws of the applicable jurisdictions. If so, the court conducts an interest's analysis, which applies the law of the jurisdiction with the greatest interest in the litigation.

Under both New York and New Jersey law, a plaintiff seeking to recover in tort for asbestos exposure on a theory of negligence, strict liability, or failure to warn must prove that exposure to the defendant's product proximately caused his injuries. New York and New Jersey both require a proximate cause to be "more likely than not . . . a substantial factor" in causing the illness. [Citation Omitted]. In New York, the plaintiff bears the burden of establishing sufficient exposure to a substance to cause the claimed adverse health effect. At a minimum, . . . there must be evidence from which the factfinder can conclude that the plaintiff was exposed to levels that are known to cause the kind of harm that the plaintiff claims to have suffered. [Citation Omitted]. Similarly, New Jersey requires the plaintiff to support a reasonable inference of substantial causation from circumstantial evidence[with] evidence of exposure to a specific product on a regular basis over some extended period of time in proximity to where the plaintiff actually worked. [Citation Omitted].

In this choice of law analysis, courts have disagreed over whether New York's and New Jersey's substantial factor tests actually conflict. However, this Federal Court concluded it did not need to determine whether an actual conflict existed here because, no matter which test applied, the plaintiff had failed to meet the burden of establishing that Holzworth was exposed to harmful levels of asbestos from a Burnham product.

Accordingly, this court ultimately concluded, in viewing the record in the light most favorable to the plaintiff, at a maximum, Holzworth was exposed to a Burnham heater and pump containing asbestos for three hours on one day in a 55 year career of exposure. There was nothing in the record that a factfinder could rely on to conclude that this sort of de minimis exposure to a Burnham product rose to a level known to cause the type of harm that Holzworth suffered (mesothelioma). Burnham's motion for summary judgment was granted on all counts.

Read the full decision here.

Denial of Summary Judgment of Boiler Manufacturer Affirmed on Appeal

(Supreme Court of New York, Appellate Division, First Department, October 13, 2016)

Relying on *Koulermos v. A.O. Smith Water Prods.,* the New York Appellate Division, First Department upheld the trial court's denial of summary judgment. The court found that the trial court used the correct standard and that Cleaver Brooks failed to put forth evidence illustrating how it was entitled to summary judgment.

Read the decision here. | Read a full summary of the case here.

Due Precaution Exception to General Rule of Non-Liability for Independent Contractors Applied to Potentially Establish Liability Against Premises Owners

(Court of Appeals of Indiana, September 28, 2016)

The plaintiff was an industrial and commercial electrician diagnosed with malignant pleural mesothelioma. He and his wife filed a complaint alleging negligence against various defendants. The plaintiffs argued defendants were vicariously liable for the acts of their independent contractor employees (non-delegable duty doctrine), those of their own employees (respondeat superior), and as premises owners. Defendants Bremen Casting and Mastic Home Exteriors moved for summary judgment, which was partially granted on the negligence of independent contractor and premises liability claims. All parties moved for interlocutory appeal. The appellate court concluded that the trial court (1) erred in granting summary judgment on the negligence of independent contractor claim, (2) did not err in denying summary judgment on the respondeat superior claim, and (3) erred in granting summary judgment on the premises liability claim.

From 1961-1980, the plaintiff worked for Koontz-Wagner Electric, which was hired by defendants to perform electrical work at their facilities. The plaintiff worked alongside defendants' employees and those of other independent contractors. He worked near asbestos insulation and other products containing asbestos. The plaintiffs claimed the employees and independent contractors of Bremen and Mastic negligently exposed the plaintiff to asbestos, and failed to maintain their premises in a reasonably safe condition. The defendants argued that under respondeat superior or the non-delegable duty doctrine, they were not liable because the plaintiff was an employee of an independent contractor injured by the very condition he was hired to address, and could not be liable as premises owners because they did not have superior knowledge of the risks of asbestos.

The parties disputed whether defendants owed the plaintiff, the employee of an independent contractor, a duty of care to protect him from the negligence of their employees and those of other independent contractors. In Indiana, a principal is not liable for the negligence of an independent contractor; however the non-delegable duty doctrine provides five exceptions to this rule for responsibilities that are so important to the community they are considered non-delegable. In this case, the intrinsically dangerous exception holds principals, such as defendants, liable for the negligence of their independent contractor if the contracts require performance of intrinsically dangerous work. The plaintiff argues the work he was hired to perform was intrinsically dangerous; defendants relied upon case law holding that working with asbestos was not intrinsically dangerous. The court agreed with this precedent and found that the plaintiff could not invoke this exception.

Another exception invoked by the plaintiff was the due precaution exception, in which a principal may be held liable where the work will probably cause injury to others unless due precaution is taken. Several elements were required to apply this exception. Again, the defendants analogized this case to prior case law. The court found that a genuine issue of material fact existed as to whether the plaintiff was injured by the very condition he was employed to address, and whether asbestos work on these premises created a peculiar risk of harm.

Further, since there was a genuine issue of material fact regarding whether the plaintiff was injured by the condition he was employed to address, summary judgment was correctly denied on the respondeat superior claim, and was erroneously granted on the premises liability claim.

Read the full decision here.

Supplier of Asbestos for Joint Compound Denied Summary Judgment

(U.S. District Court for Eastern District of North Carolina, Eastern Division, September 21, 2016)

The U.S. District Court for the Eastern District of North Carolina denied the motion for summary judgment of defendant Union Carbide Corporation in a case involving alleged exposure to raw asbestos fiber allegedly in joint compound. James Lee was a painter in North Carolina from the late 1960s into the 2000s, and during that time the plaintiffs allege that Lee applied and sanded asbestos-containing joint compound to finish drywall, as well as sanded and swept joint compound. Sanding joint compound created a dust, which would cake in Lee's hair, on his face, and on his clothes. Lee stated that he worked primarily with U.S. Gypsum joint compound and Georgia-Pacific ready-mix joint compound throughout his painting career, and sanded it on every job he did while working for employers between 1970 and 1974 or 75. Lee worked on approximately 150 to 200 jobs involving joint compound during that time frame. The plaintiffs allege that Lee's exposures to asbestos caused his mesothelioma.

Union Carbide moved for summary judgment, contending that plaintiffs failed to present evidence establishing proximate causation. The court, viewing the facts in a light most favorable to the plaintiffs, found that the plaintiffs had

proffered sufficient evidence to create a genuine issue of material fact as to whether Lee was exposed to Union Carbide's asbestos on a regular basis over an extended period of time. The court referenced evidence demonstrating that Union Carbide had supplied its Calidria asbestos to both Georgia-Pacific and U.S. Gypsum for manufacture of their joint compounds during the relevant time period. Finally, the court noted that plaintiffs proffered sufficient evidence to resist summary judgment that Union Carbide's failure to warn Georgia-Pacific and U.S. Gypsum of the dangers of its Calidria product was a proximate cause of Lee's mesothelioma.

Read the full decision here.

Employers Not Liable for Employee Take-Home Exposure

(Court of Appeals of Arizona, Division One, September 20, 2016)

The plaintiffs allege Ernest V. Quiroz was exposed to asbestos from his father's work clothes during the years he lived at his father's home (1952 to 1966). Defendant Reynolds moved for summary judgment, arguing that it did not owe Dr. Quiroz a duty of care. The trial court granted the motion, finding Reynolds "had no duty to Plaintiffs as a matter of law." The plaintiffs appealed and the case was heard by the Court of Appeals of Arizona, Division One. In a negligence action under Arizona law, a "duty" is defined as an obligation, recognized by law, which requires the defendant to conform to a particular standard of conduct in order to protect others against unreasonable risks of harm. Whether a defendant owes the plaintiff a duty of care is a threshold issue; absent this duty of care, there can be no viable claim for negligence.

The Appeals Court noted that whether a defendant owes a plaintiff a duty of care does not turn on the foreseeability of injury [Citation Omitted]. In determining whether a duty exists, the court does not undertake a fact-specific analysis or look at the parties actions. This duty may arise from (a) the relationship between the parties or, alternatively, from (b) public policy considerations. The court addressed both possible duty sources in their decision.

First, the plaintiffs failed to contend that Reynolds and Quiroz had either a special or categorical relationship. Instead, the plaintiffs put forth an argument under Restatement (Third) of Torts Sec. 54(a); which states "an actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm, and imposes a general duty of reasonable care on all persons." The court responded by noting they previously declined to adopt a general duty of care, finding that doing so would substantially change Arizona's longstanding conceptual approach to negligence law by effectively eliminating duty as one of the required elements of a negligence action. The plaintiffs further contended that Quiroz's injury was foreseeable to Reynolds, and whether Reynolds acted unreasonably in failing to prevent that foreseeable injury, were issues for the jury. The court declined to address this issue as foreseeability is not a consideration in determining whether a duty exists under Arizona law. [Citation Omitted].

Second, the court addressed the fact that a duty of care can originate in public policy arising from statues or common law. However, absent either, they typically will not find a duty based on public policy. In this case, the plaintiffs cited no statutory or common law basis that Reynolds owed a duty of care beyond the Restatement of Torts citation previously discussed. Instead the plaintiffs raised arguments with respect to the following four public policy factors to which the court addressed each in turn:

(1) Reasonable expectations of parties and societies generally. The court found that the plaintiffs did not offer any support for their argument that "any property owner could reasonably expect that lack of due care in handling toxins on its premises, resulting in off-premises injury, could lead to liability."

(2) Proliferations of claims. The court found this public policy factor would necessitate the court to find a duty of care based in part on foreseeability of harm, which is foreclosed under Arizona law.

(3) Likelihood of unlimited or insurer-like liability. The court found that, absent specific constraints not present in the current case, any company that made or used a potentially hazardous substance could be liable to anyone who ever came in contact with an employee who could have carried the substance off site. Such a dramatic expansion of liability would not be compatible with public policy.

(4) Connection between Reynolds' Allegedly Negligent Conduct and Quiroz's Harm. The court found that any connection between Reynolds' "conduct" and Quiroz's injuries would go to causation, not duty. Therefore, it is not relevant to this discussion.

After considering Quiroz's relationship with Reynolds (or lack thereof) and the public policy factors, the Appeals Court concluded the potential drawbacks of recognizing a duty of care in take-home exposure cases outweigh the potential

benefits. This court also distinguished other, out-of-state decisions, such as New Jersey, by the fact that they rely on foreseeability in its duty analysis. Under Arizona law, duty is not considered, and the Appeals Court found that Reynolds owed no duty of care to Quiroz for alleged take-home exposure.

Read the full decision here.

Summary Judgment Denied Where Defendant Merely Pointed to Gaps in Evidence and Asked Court to Weigh Credibility of Witness

(Supreme Court of New York, New York County, August 22, 2016)

In this case, the plaintiff Gaspar Hernandez-Vega alleges that he developed mesothelioma as a result of his alleged exposure to asbestos-containing products while working as a pipefitter. At his deposition, Hernandez-Vega testified interchangeably to work with "Edward valves," "Vogt valves," and "Edward-Vogt valves" that exposed him to asbestos through his changing of the packing and gaskets applied to those valves. The defendant Flowserve is the successor in interest for Edward Valves, Inc., the Vogt Valve Company, and Edward-Vogt (created following a merger of the two companies).
Flowserve moved for summary judgment, arguing that the identification of Edward-Vogt was a misidentification, because Edward-Vogt valves did not come into existence until 1998. Flowserve also submitted the affidavit of David Osbourne, who worked for the company for 43 years in various engineering, sales, and marketing positions. Osbourne stated that prior to 1998 there was no valve manufactured, labeled, or branded "Edward-Vogt." As such, Flowserve argued that the plaintiff could not have worked with any Edward Vogt valves during his career as a pipefitter in the 1960s and 1970s because they did not yet exist.

The court denied summary judgment, pointing out that Flowserve had failed to meet its initial burden by proffering no evidentiary proof demonstrating that its valves were not at the plaintiff's worksites. Instead, Flowserve pointed to gaps in an opponent's evidence, which is "insufficient to demonstrate a movant's entitlement to summary judgment." Moreover, even if Flowserve had met its burden, issues of fact existed for trial because a reasonable inference could be drawn from plaintiff's testimony concerning his encounters with "Edward valves," "Vogt valves," and "Edward-Vogt valves" that the plaintiff separately encountered "Edward valves" and "Vogt valves." The Court explained that for it to discount plaintiff's separate invocation of his encounters with "Edward valves," "Vogt valves," and "Edward-Vogt valves," and conclude that he must have been referring solely to "Edward-Vogt valves" that did not come into existence until 1998, it would have to improperly weigh the quality of the testimony and disregard portions of it "as being unworthy of belief." The court concluded that "it is for the jury, not the court, to weigh plaintiffs credibility and resolve inconsistencies in his testimony."

Read the full decision here.

California High Court Declines to Review Appellate Reversal of Trial Court's Grant of Summary Judgment

(California Supreme Court, August 25, 2016)

On August 25, 2016, the California Supreme Court, without a written opinion, declined to hear a petition to review an appellate panel's decision to overturn a trial court's grant of summary judgment to Hennessy Industries Inc. In this case, the plaintiff claimed that the decedent, Frank Rondon, worked as a mechanic using defendant Hennessy's (Ammco Tools) brake arcing machines designed to grind asbestos brake shoes. Hennessy moved for summary judgment arguing that the brake grinders did not contain asbestos and plaintiffs could not establish that the brake grinders were made to be used exclusively and inevitably with asbestos brakes. The trial court agreed with that argument. The appellate court, leaning heavily on *O'Neil v. Crane Co.*, 53 Cal. 4th 335 (2012), reversed the trial court holding that a showing of "inevitable use" is required and based on the evidence before the court that standard was satisfied and summary judgment was not proper. A discussion of that decision may be found here.

Summary Judgment for Crane Manufacturer Based on Affidavit of Company Vice President

(Superior Court of Connecticut, Judicial District of Fairfield at Bridgeport, July 19, 2016)

Plaintif Katherine Filosi, individually and as executor of the estate of Donald Filosi, filed a complaint against multiple defendants, including American Crane & Equipment Corporation (ACECO). The plaintiff alleged that the decedent Donald Filosi was exposed to asbestos while employed by Boat Corporation (Electric Boat) as a rigger from 1961 to 1998 and, as a result of that exposure, he developed lung cancer and died.

Defendant ACECO moved for summary judgment, arguing that the plaintiff produced no evidence from which a jury could conclude that Mr. Filosi was ever exposed to asbestos from any product manufactured, distributed, or sold by ACECO. ACECO argued that the cranes referenced by Mr. Filosi in his deposition bearing the name "American" were not manufactured by ACECO. In support of its argument, ACECO submitted an affidavit by its Vice President, Chief Financial Officer, and General Counsel and documents of ACECO. The affidavit established that ACECO never manufactured boom crane, such as the ones referred to by Mr. Filosi. Further, examination of ACECO's billing and shipping records established that the only crane ACECO sold to Electric Boat was a highly specialized small crane used for lifting munitions onto a submarine; this crane did not contain asbestos or any asbestos containing components. Finally, the affidavit stated that the defendant's trade name is "ACECO" and the words "American" and "Crane" never appeared anywhere on any of ACECO's cranes.

The court found that the "affidavit negates the Plaintiff's claim that the injuries of the plaintiff's decedent were caused by his exposure to asbestos through contact with ACECO's products." The "only reasonable conclusion" that could be made by a jury on the basis of the affidavit is that the alleged injuries were not a result of his exposure to any product designed, manufactured, or sold by ACECO" and, therefore, the evidentiary burden shifts to the plaintiff to produce evidence to demonstrate that a genuine issue of material fact exists with respect to causation.
The court concluded that the evidence submitted by the plaintiff failed to demonstrate a genuine issue of material act with respect to causation because the plaintiff's opposition "fails to address the specific statements made" in the affidavit and has no evidence "disputing the affidavit's assertions that ACECO sold just one particular crane to Electric Boat and that this one crane did not contain asbestos or asbestos-containing products."

Read the full decision here.

Court Denies Multiple Motions including Plaintiff and Ford Motor Co.'s Daubert Motions, Ford's Motion for Summary Judgment and Plaintiff's Motion for Reconsideration

(U.S. District Court for the Southern District of Florida, July 11, 2016)

Plaintiff James Waite and his wife Sandra Waite brought this action against Ford Motor Co. and Union Carbide Corporation (UCC) for Mr. Waites' alleged development of mesothelioma from his work on brakes and clutches. UCC's motion to dismiss for lack of personal jurisdiction was at first denied by the Court but then granted on UCC's Motion for Reconsideration. Ford then moved to exclude the plaintiffs' experts (Daubert Motion) and for summary judgment. The plaintiff moved to preclude various elements of Ford's proposed expert witness testimony and also moved for reconsideration of the order dismissing UCC.
The court began its lengthy discussion with the three prong test for a Daubert Challenge, which includes 1) the expert is qualified to testify competently regarding the matters he intends to address; 2) the methodology by which the expert reaches his conclusions is sufficiently reliable; 3) the testimony assist the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or determine a fact in issue. An expert's "knowledge, skill, experience, training or education" is also to be considered. However, the court is not to "exclude an expert based on a belief that the expert lacks personal credibility."

As for the plaintiffs' motion to limit Ford's expert's proposed testimony, the court noted that argument made was "narratively interesting," but that it was irrelevant to the Daubert analysis. The court also noted that the plaintiff's argument struck at the strength of Ford's expert testimony but that those issues were reserved for the trier of fact. Another point made by the plaintiff was the fact that Ford directly or indirectly funded the research that its experts would rely upon. However, the "source of funding for a piece of peer-reviewed scientific literature is a question of weight, not admissibility," according to the court. Yet another attack made by Plaintiffs was that the studies presented by Ford did not support the notion or position that auto mechanics have no increased risk of developing mesothelioma. The court disagreed and found that this very issue was one to be addressed on cross-examination. Finally, the plaintiff argued that Ford's experts should not be allowed to submit opinions that certain asbestos fibers

are more potent than others. The crux of this argument was that Ford had not identified a source of amphibole exposure and as such, amphibole exposure was irrelevant. The court disagreed as it found that a defendant may offer evidence of potential alternative causes of disease.

Ford contended that the plaintiff's historical expert Dr. Barry Castleman's testimony should be excluded. Primarily, Ford argued that he should not be permitted to testify just because he "read and researched." The court disagreed and noted that Ford ignored Dr. Castleman's "level of education, training, and experience far surpasses casual research." Specifically, Dr. Castleman's level of education is dispositive of Ford's motion. The court also noted Dr. Castleman's publications and his personal work and effort to warn the public of the dangers of asbestos. In sum, the court found that Dr. Castleman was not only qualified to testify but also reliable. Ford continued its argument and attempted to exclude Drs. Brody and Frank as unreliable and unhelpful. The court refused an extensive Daubert analysis on the question of general toxicity. Rather, the court stated that the issue of causation is so well settled that the real issue is whether the plaintiffs' exposure is "of the magnitude" to cause his disease. Ford argued that as to specific causation, Drs. Brody and Frank could not testify as to substantial factor of exposure from a Ford product. The court disagreed as they used the same weight-of-evidence approach as the International Agency for Research on Cancer and Disease Registry, the World Health Organization and the United States Agency for Toxic Substances and Disease Registry. Of particular interest, the court stated: "Plaintiffs' experts have properly considered and evaluated a variety of scientific evidence concerning asbestos in formulating their opinions." In sum, the court found Drs. Brody and Franks' testimony both reliable and helpful.

Ford also moved for summary judgment notwithstanding the Daubert Challenge. Ford contended that even with the testimony of Drs. Brody and Frank, the plaintiffs could not establish causation to a Ford product. Specifically, Ford argued that Dr. Frank's weight-of the-evidence approach is contra to Florida law, which uses a standard to introduce evidence of a reasonable basis for the conclusion of causation. The court disagreed and found that Dr. Frank's testimony was in fact based on a reasonable basis. Ford also argued that summary judgment was appropriate as it was protected by the Bare Metal Defense. The court agreed with Ford in its understanding of the Bare Metal Defense but pointed out the obvious testimony that Mr. Waite had performed 8 brake jobs with original Ford equipment. Accordingly, Ford was a "Bare Metal Supplier" and it could not rely on that defense.

As for the plaintiffs' motion for reconsideration, the court reminded the three grounds justifying reconsideration which include 1) an intervening change in controlling law; 2) the availability of new evidence 3) the need to correct clear error or prevent manifest injustice. The plaintiffs argued that the court had "manifestly misapplied controlling law." However, the court stated that the arguments were the same arguments made by the plaintiffs from the onset of the case. Further, the court addressed the plaintiffs' contentions in its prior order. According to the court, nothing put forward by the plaintiffs warranted re-litigation of whether UCC "availed itself to this forum" for purposes of establishing personal jurisdiction.

Read the full decision here.

Defendants Granted Summary Judgment Where Plaintiff Failed to Satisfy Frequency, Proximity, Regularity Standard

(U.S. District Court for the District of Delaware, August 9, 2016)

Plaintiff Robert Lee Winhauer filed an asbestos action in the Delaware Superior Court against multiple defendants, asserting personal injury claims relating to a mesothelioma diagnosis proximately caused by alleged exposure to asbestos. The defendants removed the action to the U.S. District Court for the District of Delaware. After Winhauer's death, the complaint was amended to substitute a representative of the estate and add a wrongful death claim. The defendants Honeywell (successor in interest to Bendix) and Ingersoll Rand both filed motions for summary judgment, which are the basis for this decision.

The plaintiff alleged that Mr. Winhauer developed mesothelioma as a result of exposure to asbestos-containing products while performing automotive maintenance work during his employment in a shipyard in Mississippi from the 1940s through 1990s. All product identification evidence was elicited from Mr. Winhauer's deposition prior to his death.

Specific to this decision, Mr. Winhauer testified that he used either Bendix or remanufactured brakes when doing brake work on his twelve personal automobiles. Although he knew some of the brakes he worked with were Bendix brand, he could not provide any details as to the amount, make, or model of the cars on which eh recalled installing Bendix brakes. Honeywell filed for summary judgment asserting that "mere speculation is not enough for Plaintiff to demonstrate frequent, regular, and proximate exposure to asbestos-containing Bendix brakes. Moreover, any

exposure that may have occurred is de minimis." The plaintiff responded that Mr. Winhauer was exposed to significant amounts of asbestos as a result of completing 12 brake jobs on personal automobiles with Bendix Brakes, each requiring four to five hours to complete. Additionally, the frequency, regularity, and proximity analysis is relaxed in mesothelioma cases.

The court ultimately granted Honeywell's motion for summary judgment, and held there was no precedent based on Mississippi law to support the assertion that the frequency, regularity, and proximity standard should be relaxed in this case. Instead, the plaintiff must show "proof of exposure to the product, on a regular basis, over an extended period of time and in proximity to where Mr. Winhauer actually worked. Additionally, any "inferences must be supported by facts in the record, not by speculation or conjecture." As such, the court found the evidence in the record was merely colorable and not significantly provable. Accordingly, there was no genuine issue of material fact as to the frequency, regularity, and proximity of Mr. Winhaur's exposure to Bendix Brakes, and the court granted summary judgment in Honeywell's favor.

With respect to Ingersoll Rand, Mr. Winhauer testified that he did infrequent maintenance work to air compressors. He could not recall the name of the manufacturer of the compressors but answered affirmatively when counsel asked if they were Ingersoll compressors. Mr. Winhauer later testified that the compressors may have been manufactured by Allis Chalmers. Ingersoll filed for summary judgment asserting that is it speculative to assume that the air compressors at issue were issued by Ingersoll. Further, there was no evidence that Mr. Winhauer was exposed to asbestos from working at the alleged air compressors. The plaintiff responded that the cumulative exposure to Ingersoll's air compressors, despite Mr. Winhauer's "mistaken" identification of Allis Chalmers as the compressor manufacturer, is sufficient to satisfy the frequency, regularity, and proximity test under a lessened standard for mesothelioma cases.

The court also granted Ingersoll's motion for summary judgment. It held that "mere proof that the plaintiff and a certain asbestos product are at the shipyard at the same time, without more, does not prove exposure to that product." Further, the plaintiff cannot establish that Mr. Winhauer was exposed to an asbestos-containing Ingersoll product with the requisite frequency, regularity, and proximity.

Read the full decision here.

Court Provides Mixed Ruling on Motions for Summary Judgment on Punitive Damages Brought by Boiler Manufacturers

(Court of Common Pleas of Lackawanna County, Pennsylvania, July 26, 2016)

The Court of Common Pleas of Lackawanna County in Pennsylvania recently ruled on partial motions for summary judgment with respect to punitive damages asserted by the paintiffs, Robert Horst, Jr. and Diane Horst. Defendants filing said motions included Burnham, LLC , Lennox Industries, Inc., and Weil-McLain.
The court stated that, in Pennsylvania, a punitive damages claim must be supported by evidence sufficient to establish that (1) a defendant had a subjective appreciation of the risk of harm to which the plaintiff was exposed and that (2) a defendant acted, or failed to act as the case may be, in conscious disregard that risk. Further, in asbestos litigation, both the Supreme Court and Superior Court in Pennsylvania have held that the existence of medical articles and trade journal publications discussing the dangers of asbestos inhalation are insufficient to support a punitive damages claim absent some proof that the asbestos defendant knew or had reason to know of the content of that literature. [Citation Omitted].

Burnham's motion for partial summary judgment as to the plaintiff's claims for punitive damages was granted. Here, the plaintiff relied upon prior deposition testimony from Burnham's chief engineer of its commercial engineering department, Roderick G. Strohl, who stated he first had concerns about the dangers of asbestos "probably in the 1970s." The plaintiff's alleged exposure was between 1970-1978. Strohl further testified that he did not know whether Burnham complied with OSHA regulations relating to asbestos during that time period. It's important to note that Strohl did not begin his employment with Burnham until 1984 and provided no testimony regarding Burnham's knowledge prior to 1984. The court found this evidence alone was insufficient to indicate Burnham had a subjective appreciation of the risk of harm from the plaintiff's exposure to asbestos.

Conversely, the court denied Lennox's motion. With respect to Lennox, the plaintiff produced evidence establishing that managerial representatives of Lennox were aware that asbestos reportedly caused lung diseases prior to and during the 1970-1978 period of the plaintiff's exposure. Specifically, the plaintiff relied upon correspondence between Lennox management and the manager of Occupational Environmental Control of Johns-Manville Corporation dated in January 1969 identifying an article discussing health problems associated with occupational exposure to asbestos.

Additionally, at the time of oral argument, Lennox's counsel conceded that Lennox did not place asbestos-related warnings on its products, but maintained there was no reason to warn. The court found, upon the documentary proof submitted, there was a genuine issue of material fact whether Lennox management had a subjective appreciation of the risk of harm from exposure to asbestos.

The court similarly denied Weil-McLain's motion. Here, the plaintiff's claim was premised upon the prior deposition transcript of Weil-McLain's corporate representative, Paul H. Schuelke. This testimony suggested that (1) Weil-McLain knew that asbestos caused lung diseases as of 1972 but did not include warnings on its asbestos cement or rope at the time; (2) In 1974, OSHA cited Weil-McLain for maintaining asbestos levels above acceptable limit; and (3)Weil-McLain did not provide warnings/instructions on their boilers containing asbestos. The court found this to be sufficient to establish factual issues regarding Weil-McLain's subjective appreciate of the risk of harm from the plaintiff's exposure to asbestos.

Read the full decision here.

Motion for Reconsideration of Summary Judgment of Defendants Electric Boat and General Dynamics Denied for Failure to Establish Material Difference in Fact or Law

(U.S. District Court for the Central District of California, August 1, 2016)

The plaintiffs' filed suit in the Superior Court for the County of Los Angeles, alleging her decedent developed mesothelioma as a result of occupational exposure to asbestos while he worked as a machinist on various U.S. Navy ships manufactured by the defendants.

The case was removed to federal court and Electric Boat and General Dynamics moved for summary judgment on all of the plaintiffs' claims. The court denied the motions. The defendants' included in their motions the argument that strict liability claims could not be brought against them. Relying on *Mack v. General Electric Co.*, the defendants argued that manufacturers of ship's various components could be held liable but the ship itself could not be construed as a "product."

The court noted that the standard for a Motion for Reconsideration is that a party may seek reconsideration of a decision on any motion on the grounds of: a) a material difference in the fact or law from that presented to the court…that…could not have been known to the party moving for reconsideration at the time of such decision, or b) the emergence of new material facts or change of law occurring after the time of such decision, or c) a manifest showing of a failure to consider material facts presented to the court before such decision.

The court examined *McIndoe v. Huntington Ingalls, Inc*. as a guide for the facts in the instant case. In *McIndoe*, a similar fact pattern existed. In that case, the plaintiff alleged that he was exposed to asbestos containing pipe insulation during maintenance work. The court was tasked with deciding whether or not the ships were considered products within the context of strict liability. The court found that ships were not products "as warships were not distributed commercially." In the instant case, the court stated that summary judgment was denied not because of an analysis of whether a ship was a product but rather because a genuine issue as to material fact existed. Specifically, the court found a material fact in dispute as to whether other asbestos containing parts or products were involved. The defendants argued that the only product involved was a "ship" based on the plaintiffs' discovery responses which stated as such. However, the court disagreed and found that even if this admission were true, it was not a "failure to consider material facts." Further, the plaintiff's opposition to the motion for reconsideration cited that their claims were also premised on the allegation that the defendants manufactured the pipe insulation that was installed on the ship. Applying the *McIndoe* case, the court clarified that the defendants cannot be held strictly liable for manufacturing a navy ship. However, *McIndoe* does not preclude that a defendant may be liable for a specific defective product, "even when that product is supplied to the military." Consequently, *McIndoe* does not require the court to revise its prior order.

Read the full decision here.

Summary Judgment Recommended Where Plaintiff Fails to Establish Substantial Factor Causation Against Multiple Defendants

(U.S. District Court for the District of Delaware, July 28, 2016)

Plaintiff Mark Hillyer sued multiple defendants, alleging that he developed mesothelioma as a result of exposure to asbestos-containing products while serving in the Navy from 1967 to 1997. His claims were based in negligence, strict liability and loss of consortium. In discovery, the plaintiff was deposed on two occasions but did not produce any other fact or product identification witnesses. The plaintiff testified that, while on the USS George Washington Carver, he conducted preventative maintenance to main engines and turbine generators as well as corrective maintenance when repairs were necessary. He later worked as an officer at a nuclear power training unit in Idaho Falls, supervising and performing maintenance on propulsion plant equipment, and aboard the USS Tinosa as a chief machinist's mate.

Several defendants, including ABB, Inc.; CBS Corp.; BW/IP, Inc.; Eaton Corp.; Union Carbide Corp. and Gould Electronics, Inc., moved for summary judgment on the basis of the plaintiff's failure to establish substantial factor causation. The respective motions were unopposed. A federal magistrate judge recommended that the district court grant the motions for the following reasons.

ABB/ITE: The plaintiff did not identify working with any ABB product. He testified that he worked in the presence of electricians who maintained electrical breakers, including ITE breakers (ITE being a predecessor company to ABB), and other internal components. The plaintiff believed the casings of the breakers consisted of asbestos-containing bakelite. He testified that he threw out cracked ITE products, even though the breakers remained encapsulated. The court determined that there was insufficient evidence to establish that the plaintiff was exposed to any amount of asbestos while handling the ITE breakers. Additionally, ABB contended that it was not liable for the ITE products identified by the plaintiff, which the plaintiff did not refute.

CBS/Westinghouse: The plaintiff identified working with asbestos-containing Westinghouse turbines during his work on the USS Tinosa. The court found that there was no evidence in the record establishing that Westinghouse manufactured the external insulation or gaskets applied to the turbines. Additionally, CBS submitted an affidavit stating that the Navy required all turbines to be delivered without insulation, and the plaintiff did not respond to that affidavit.

BW/IP: The plaintiff identified Borg Warner as the manufacturer of the brine pumps aboard the USS George Washington Carver and the USS Tinosa. He testified that he worked on the brine pump on the USS Washington Carver on one occasion. However, he testified that he was exposed to asbestos-containing Flexitallic gaskets between the desurgers and the pumps, and there was no evidence that those gaskets were originally installed by BW/IP.

Eaton/Cutler-Hammer: According to the plaintiff, his source of exposure to an asbestos-containing product by Cutler-Hammer resulted from occasionally assisting electricians on the USS George Washington Carver or being in their presence. He did not personally work on any Cutler-Hammer breakers, and he did not know if any dust associated with the electricians' work contained asbestos. Eaton also submitted an expert report indicating that, even if the breakers contained asbestos, they would have only emitted trace amounts of asbestos that would not have been substantial enough to cause the plaintiff's injuries. As such, the plaintiff could not establish more than minimal exposure.

Union Carbide: The plaintiff believed he was exposed to asbestos-containing bakelite by working near electricians performing work on electrical breakers and switches. The court recommended summary judgment as to Union Carbide because the plaintiff failed to establish that he was exposed to any asbestos-containing bakelite. Even if the bakelite did contain asbestos, the plaintiff could not establish that he was exposed to respirable fibers from the product because he did not know if any dust in his vicinity was associated with the electrical breakers.

Gould: The plaintiff alleged exposure to Gould products during an overhaul of the USS George Washington Carver in 1972 or 1973; specifically, while working around electricians who were replacing breaker switches. He did not work directly with a Gould product. He also could not recall a specific Gould component or whether it may have exposed him to asbestos. Accordingly, summary judgment was recommended as to Gould as well.

Read the full decision here.

Court Denies Aircraft Engine Manufacturer's Motion for Summary Judgment Based on Military Contractor Defense

(U.S. District Court for the Middle District of Florida, Jacksonville Division, July 1, 2016)

The plaintiff filed a Third Amended Complaint against United Technologies Corporation, alleging that UTC was liable in negligence and strict liability for the allegedly defective warnings accompanying Pratt and Whitney TF-30 aircraft engines and for their allegedly defective designs. The plaintiff claims that these defects led to her husband Darryl Dugas' exposure to asbestos and mesothelioma.

During his service in the U.S. Navy, Mr. Dugas worked at Cecil Field in Jacksonville, Florida and aboard the USS Franklin D. Roosevelt. As part of his duties, he inspected, maintained, and repaired the exterior of A-7 aircraft, which sometimes involved the use of the epoxy adhesive "934." He also assisted in the removal and re-installation of Pratt and Whitney TF-30 engines, which sometimes entailed the use of compressed air inside the engine bay and which resulted in airborne debris. According to the opinion, the Pratt and Whitney engines sold during Mr. Dugas' tenure in the Navy contained "asbestos-laden" components, which were intended to be "consumable" and which would break down over time and be replaced with identical Pratt and Whitney replacement parts.

UTC moved for summary judgment on the basis of the military contractor defense. In *Boyle v. United Technologies Corp*., 487 U.S. 500 (1988), the Supreme Court explained that the military contractor defense would bar liability to military contractors when "(1) the United States approved reasonably precise specifications; (2) the equipment conformed with those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States." The trial court underscored that the defense does not apply in cases where the government "merely approved imprecise or general guidelines and the contractor retained the discretion over the design feature in question." Simply stated, the military contractor defense "is available only when the defendant demonstrates with respect to its design and manufacturing decisions that the government made me do it."

The trial court found that it was unclear whether the government reviewed, considered and approved UTC's use of asbestos in the TF-30 engines. It also stated that UTC knew of the hazards of asbestos by 1952, that UTC was unable to produce contracts for its sale of the TF-30 engines to the Navy and that "not all of the asbestos-containing parts were necessarily required to be included with the TF-30 engines, nor it is clear that the Navy knew the parts contained asbestos." The court further determined that there was sufficient evidence for a reasonable jury to decide whether UTC was prevented from including a warning with the engines. Accordingly, the court denied UTC's motion for summary judgment.

Read the full decision here.

Federal Court Grants Summary Judgment to Defendants for Plaintiffs' Failure to Establish Substantial Factor but Denies It as to Joint Compound and Outside Contractor Defendants

(U.S. District Court for the District of Maryland, July 25, 2016)

Plaintiffs Charles Arbogast and Barbara Arbogast brought this action against multiple defendants for Mr. Arbogast's alleged development of mesothelioma as a result of his occupational exposure at Bethlehem Steel Sparrows Point Steel Mill, amongst other sites.

Several defendants moved for summary judgment, including Eaton Corporation (Cutler Hammer), Foster Wheeler, MCIC, Georgia Pacific (GP), Schneider Electric (Square D), Union Carbide (UCC), and Crane Co. The court began its analysis by reciting the standard for summary judgment, which is appropriate when "the movant shows there is no genuine dispute as to any material fact." Further, the court recited Maryland's standard for causation, which includes 1) the specific product, attributable to a specific defendant, contained asbestos; 2) the product was used in such a way that it released respirable asbestos fibers into the air breathed by the plaintiff; and 3) the plaintiff encountered the respirable asbestos fibers from a specific product with such frequency and regularity and in such proximity to the product that a factfinder may reasonably infer the specific product was a substantial factor in bringing about 4) the claimed physical injury. Further, the plaintiff has the burden, in a strict liability case, to prove that the product defect existed when the product left the defendant's control, renders the product unreasonably dangerous, and was foreseeably present when encountered by the consumer.

Eaton: The court granted Eaton's motion for summary judgment. The court found that nothing was presented by the plaintiff to prove he was exposed to a specific product made by Eaton. Specifically, the plaintiff stated in his deposition that he could not recall whether any lighting panels he worked with at Bethlehem Steel contained asbestos. As a result, the court concluded that the plaintiff did not put forth any evidence that he was exposed to asbestos from a specific Eaton product.

Foster Wheeler: The plaintiff argued that Foster Wheeler's motion for summary judgment should be denied because its boilers at Bethlehem Steel were covered with asbestos insulation. The plaintiff relied on the recent *May* decision, which eroded defenses once afforded under the bare metal defense. In that decision the court concluded that a manufacturer will have a duty to warn under strict liability and negligence claims when 1) its product contains asbestos components, 2) asbestos is a critical part of the pump sold by the manufacturer, 3) periodic maintenance involving the handling of asbestos gaskets and packing is required, and 4) the manufacturer knows or should know the risks from exposure to asbestos. However, the court disagreed with the plaintiffs' contentions and granted Foster Wheeler's motion because it was troubled by the lack of evidence that Foster Wheeler's boilers required asbestos. Therefore, the plaintiff did not satisfy his burden under the May decision.
MCIC: MCIC was alleged by the plaintiff to have replaced pipe insulation at the Mount Clare Shop of the B and O Railroad where the plaintiff also worked. The plaintiff first recalled MCIC pipe workers in 1965 while he was replacing light bulbs and working on electrical equipment. Although he was not able to say how often he went into the shop, he stated that he would be there for approximately 20-30 minutes at a time. A co-worker confirmed the frequency of MCIC's workers at the shop. The court found the evidence sufficient to infer that Kaylo was used by MCIC at the shop. Although the court denied MCIC's motion, it noted that it had doubts about whether the plaintiff could pass the test of frequency, regularity and proximity.

GP: GP moved for summary judgment as to the plaintiffs' strict liability claims. GP argued that the 1976 Maryland law governing dangerous products postdated the alleged exposure to its ready mix product. Therefore, GP argued it was not liable. The court rejected this argument and breathed life into an older Maryland tort case called *Babylon*. The court stated that *Babylon* encompassed the same principles of protecting harm to a person from chattel sold by a seller under basic negligence principles. As a result, the court denied the motion as to GP.

Schneider Electric: The court granted Schneider Electric's motion. Like the motion filed by Eaton, the court stated that the plaintiff failed to provide any evidence of exposure to a specific Square D product. Instead, the plaintiffs' allegations were general in nature.

UCC Bakelite and Calidria: The court also granted UCC's motion for summary judgment as to the plaintiff's allegations of exposure to Bakelite and Calidria. Specific to Bakelite, the court was not persuaded by the plaintiffs' use of documents from the United States Trademark Office and affidavits from UCC. The court stated that expert evidence from UCC illustrated that Bakelite is a "generic" term for a phenolic material. Therefore, nothing showed that the exposure alleged by Arbogast to Bakelite was that of a UCC product. As for Calidria, another fiber product of UCC, the plaintiff argues that UCC was the exclusive supplier of asbestos fiber to GP and Gold Bond (National Gypsum) from 1970-1973. The court was troubled by the fact that the plaintiff offered nothing to support this allegation. Additionally, the plaintiffs cited discovery answers from National Gypsum but did not authenticate the document or establish that UCC was a party to that case involving the discovery answers. Further, GP's former employee had testified that UCC was not the only supplier of asbestos to GP. The court was not persuaded by the plaintiffs' argument and granted UCC's motion for summary judgment.

Crane: The court quickly granted the motion for summary judgment filed by Crane Co. The plaintiff argued that Arbogast was exposed to Crane Co.'s Cranite sheet gasketing material. Cranite was alleged to have been used in Crane valves, fittings, and pipe. The court honed in on Crane Co.'s Answers to Interrogatories, which listed the chrysotile percentage of Cranite but also named the balance of Cranite as consisting of natural rubber binder and inert filler. Although Arbogast recalled seeing Cranite during his employment, the plaintiff did not show that he was exposed to any respirable fibers thereof. Consequently, the motion was granted. Crane Co.'s remaining motions were found as moot.

Read the full decision here.

Summary Judgment Denied to Talc Defendant on Statute of Limitations, Burden of Proof, and Causation Issues

(Supreme Court of New York, New York County, June 22, 2016)

In this asbestos personal injury action the plaintiffs allege that Arlene Feinberg contracted mesothelioma because of exposure to asbestos-contaminated talc from defendant Colgate-Palmolive Company's Cashmere Bouquet. Colgate moved for summary judgment, arguing 1) the plaintiffs' action is barred by the statute of limitations; 2) the plaintiffs failed to exclude other potential causes of Ms. Feinberg's mesothelioma; 3) the plaintiffs failed to prove that Cashmere Bouquet caused the mesothelioma; and 4) that there is no evidence of general or specific causation. The plaintiffs opposed summary judgment, arguing that Colgate failed to prove that the action was time-barred because Ms. Feinberg's symptoms were too isolated or inconsequential to trigger the statute of limitations. The plaintiffs further asserted that they did not bear the burden on summary judgment to exclude other potential causes of a plaintiff's illness. Rather, Colgate has the burden of proof on summary judgment to demonstrate that Cashmere Bouquet could not have caused the injury and it failed to do so. Finally, the plaintiff argued that the causation issue was foreclosed in prior decisions. The court agreed with the plaintiffs on all issues, and denied summary judgment.

On the question of whether the claims were time-barred, the court determined that the issue must be decided by the jury. The statute of limitations provides for a three-year limitations period for actions to recover damages for injuries to person or property caused by the latent effects of exposure to any substance or combination of substances, in any form, upon or within the body or upon or within property. That period is computed from the date of discovery of the injury by the plaintiff or from the date when through the exercise of reasonable diligence such injury should have been discovered by the plaintiff, whichever is earlier. For the purposes of the statute, discovery occurs when the injured party discovers the primary condition on which the claim is based. In review of the evidence, the court determined that "[t]he evidence does not permit me to decide the issue as a matter of law. While Mrs. Feinberg experienced many of the symptoms that one would experience with mesothelioma, those symptoms may have been attributable to other causes (like pneumonia or cardiomegaly). Therefore, here is an issue of fact as to whether the pain and effusion that she experienced prior to February 28, 2008 was in fact symptoms of malignant mesothelioma or, whether the symptoms related to another illness."

The court also rejected Colgate's argument that it was entitled to summary judgment because the plaintiff had not excluded other potential asbestos exposures and therefore, absent testing of the bottles of Cashmere Bouquet used by Ms. Feinberg, Plaintiffs could not prove a defect by circumstantial evidence. The court found the argument unpersuasive because it is not a plaintiff's burden on summary judgment to exclude all other potential causes of injury, it is a defendant's burden to establish a prima facie case of another cause before a plaintiff must raise an issue of fact. The court held that even though there was evidence that Ms. Feinberg was exposed to asbestos from tiles, secondhand smoke from her husband's Kent cigarettes, and lived near a waste dump, does not establish Colgate's entitlement to summary judgment.

Colgate argued that even if the plaintiffs could demonstrate that Ms. Feinberg was exposed to asbestos from Cashmere Bouquet talcum powder, there is no evidence that such exposure was a substantial factor in causing her disease because, Colgate claimed, the product was safe. The plaintiff countered with evidence of asbestos contamination in the product. The court held that Colgate's "argument is unpersuasive because it is not plaintiffs' burden on summary judgment to prove that exposure to Cashmere Bouquet was a substantial factor in causing Mrs. Feinberg's disease. Colgate has failed to meet its burden to demonstrate that Cashmere Bouquet "could not have contributed to the causation of plaintiff's injury." Colgate's argument was premised on its own conclusion that its product did not contain asbestos, or sufficient amounts of asbestos, to cause harm. The court, however, noted that the evidence is conflicting on this issue which raises issues of fact for the jury.

Finally, the court rejected Colgate's arguments that the plaintiffs could not show general or specific causation. The court rejected this argument as an attempt to re-litigate expert evidentiary issues that were previously decided by the court. The court agreed, noting that Judge Shulman's reasoning that a jury will have to weigh the evidence the parties are expected to present to decide whether [Colgate's] consumer talc product was in fact contaminated with amphibole asbestos in sufficient quantity to have been a substantial factor in causing decedent-plaintiff Feinberg's mesothelioma."

Read the full decision here.

Summary Judgment Reversed Where Court Finds Genuine Dispute as to Fraudulent Transfer of Assets

(Court of Appeals of Wisconsin, District Four, June 23, 2016)

The plaintiff filed this personal injury lawsuit under theories of negligence and strict liability following the death of her husband from mesothelioma. The plaintiff maintained that her husband was exposed to asbestos-containing products allegedly manufactured and/or sold by Fire Brick Engineers Company, Inc. (FBE Company) from approximately 1963-69. In approximately 1983, Fire Brick Engineers Corporation (FBE Corporation), whose investors included attorneys who had previously represented FBE Company, purchased the assets of FBE Company and eventually changed its name to Fire Brick Engineers Company, Inc. In the late 1980s, FBE Company, Inc. merged with Power Holdings, Inc. FBE Company, Inc. and Power Holdings, Inc. were sued in the case as successors to FBE Company.

The defendants moved for summary judgment, arguing that there was insufficient evidence that they distributed or sold any asbestos-containing products and, further, that "although they acquired the assets of FBE Company, there was no basis upon which to impose liability…as successors of FBE Company." The motion included an affidavit from a representative of Powers Holdings, Inc. and a copy of the 1983 purchase agreement, which provided that FBE Corporation agreed to assume certain of the liabilities and obligations of FBE Company, but none which pertained to asbestos. Specifically, there was a provision that FBE Corporation "does not…assume or agree to pay or perform any other liabilities or obligations of [FBE Company] of any kind, whether or not related to the Subject's Business, all of which liabilities and obligations remain the sole responsibility of [FBE Company]." The circuit court granted the defendants' motion for summary judgment, and the plaintiff appealed.

On appeal, the plaintiff maintained that there was a factual dispute as to the application of an exception to the general rule in Wisconsin against successor liability; particularly, whether the sale of FBE Company's assets to FBE corporation was fraudulent because it was executed to avoid FBE Company's potential asbestos liability. The Court of Appeals agreed and determined that the issue was governed by Wisconsin's Uniform Fraudulent Transfer Act at Wis. Stat. § 242.04(1)-(2), which deals with actual intent. According to the Court, "the issue of intent is generally not readily susceptible of determination on summary judgment." It concluded that, viewing the facts in the light more favorable to the plaintiff, a jury could reasonably infer that FBE Company intended to sell its assets to FBE Corporation to avoid future liability from the sale and manufacture of asbestos-containing products — particularly given the evidence that a director of, and attorneys for, FBE Company were the buyers of FBE Company's assets.

The judgment of the circuit court was reversed and the case remanded for further proceedings.

Read the full decision here.

Ninth Circuit Reverses Summary Judgment for Pump Defendants on Evidence of Supply of Asbestos Containing Gaskets and Packing to U.S. Navy

(U.S. Court of Appeals for the Ninth Circuit, June 16, 2016)

John H. Boyd, III, as the representative of the plaintiff and appellant Captain John H. Boyd, Jr. (deceased), appealed to the Ninth Circuit the District Court for the Central District of California's granting of summary judgment in favor of Warren Pumps, LLC, and Air and Liquid Systems Corporation (successor in interest to Buffalo Pumps, Inc.) in this diversity products liability action. In this case, it was alleged that exposure to asbestos from the appellees' products during Captain Boyd's service on board the U.S. Navy's USS Gainard and USS McCain in the 1950s caused Captain Boyd to develop mesothelioma.

The Court of Appeals affirmed the district court's grant of summary judgment on the ground that Captain Boyd failed to present evidence sufficient to link Buffalo Pumps or Warren Pumps to asbestos-containing replacement parts to which Captain Boyd was exposed during his service onboard the USS Gainard. The court noted that the defendants could only be held liable for exposure to asbestos-containing products that were either manufactured or supplied by them under *O'Neil v. Crane Co.*, 266 P.3d 987, 1005 (Cal. 2012). However, the court reversed and remanded the granting of summary judgment as to the alleged exposures aboard the USS McCain.

The appellants alleged that Captain Boyd was exposed onboard the USS McCain to asbestos from spare packing and gaskets provided with original pumps supplied to the Navy by Buffalo Pumps and Warren Pumps. The Court of Appeals found that the circumstantial evidence raised more than a mere possibility that he was exposed to asbestos-containing spare parts supplied by the defendants either during the initial servicing of the pumps or when those spare

parts were removed and replaced during the second servicing of those same pumps. The court found especially notable that there was evidence that the pumps and valves at issue were shipped from the manufacturer to the Navy with asbestos packing or gaskets. The court also found: "Captain Boyd's showing on this point is bolstered by the declarations of retired Naval engineering officer Francis J. Burger, which state that, as Navy equipment vendors, equipment manufacturers like Buffalo and Warren Pumps more likely than not supplied with a new pump at the time it was sold to the United States Navy spare asbestos-containing packing and gaskets that were designed for use with that original pump."

The court concluded that a jury could reasonably conclude that Captain Boyd was exposed onboard the USS McCain to asbestos-containing spare packing and gaskets supplied by Buffalo and Warren Pumps.

Read the full decision here.

Court Declines to Address Causation Standard In Upholding Summary Judgment on Trial Court's Less Burdensome Standard

(Supreme Judicial Court of Maine, June 7, 2016)

Plaintiff Patricia Grant and the Estate of Edward Grant appealed from summary judgments entered against them on their complaint for damages for Edward Grant's lung cancer and death based on negligence, failure to warn of defective, unreasonably dangerous goods, and loss of consortium. Summary judgment was granted on the motions of New England Insulation Company (NEI); Foster Wheeler, LLC; Warren Pumps, LLC; and IMO Industries, Inc. The plaintiff's decedent Edward Grant worked for Beth Iron Works from 1964 to 1970 and again from 1978 to 1994 in a variety of positions, including as a ship cleaner. Cleaning included sweeping up debris — sometimes including asbestos — that resulted from construction and maintenance activities. At his deposition, Grant testified that he believed he was exposed to asbestos as a cleaner between 1966 and 1967, during which time he recalled sweeping up asbestos resulting from pipe covering work but he was unsure if he was exposed to asbestos at other times.

NEI, Foster Wheeler, Warren, and IMO filed motions for summary judgment on the basis that the plaintiff had not established a prima facie case that Grant ever breathed asbestos from the defendants' products. The trial court granted these motions and the plaintiffs appealed arguing that the court erred in its decision.

The Supreme Judicial Court of Maine reviewed and upheld the granting of the motions for summary judgment. The court was faced with the question of what amount of product exposure a plaintiff's evidence must demonstrate to survive summary judgment. The trial court required plaintiff to show that the defendant's asbestos-containing product was at the site where the plaintiff worked or was present, and that the plaintiff was in proximity to that product at the time it was being used. The court compared that standard to the Lohrmann "frequency, regularity, and proximity test," which requires that there must be "evidence of exposure to a specific product on a regular basis over some extended period of time in proximity to where the plaintiff actually worked" in order to support a reasonable inference of substantial causation. The court, however, did not reach the question of the appropriate standard as it found that the plaintiff's evidence did not meet even the less burdensome standard stating "because we conclude that [plaintiff] has not offered evidence to satisfy even the less burdensome standard applied by the trial court, we need not decide whether Maine should utilize the greater Lohrmann standard."

Read the full decision here.

Court Denies Plaintiff's Motion for Reconsideration on Grant for Summary Judgment in Determination That Defendant Did Not Qualify as "Apparent Manufacturer"

(Court of Special Appeals of Maryland, May 31, 2016)

The plaintiff, Harriette Stein, personal representative of the Estate of Carl Stein, filed an amended complaint with claims against defendant Pfizer under the theory that the decedent's exposure to an asbestos-containing refractory cement, called "Insulag," which was supplied to the decedent's employer, Bethlehem Steel, by Pfizer's subsidiary, Quigley Company, Inc., was a substantial factor in the decedent's illness and eventual death from mesothelioma. The plaintiff alleged that Pfizer was the "apparent manufacturer" of this product because Quigley's invoices and marketing materials bore Pfizer's trademarks, as well as its own; the words "Manufacturers of Refractory Products" appeared

beneath the exhibition of those corporate designations; and Pfizer had, in effect, held itself out as a "manufacturer" of Insulag.

The Baltimore City Circuit Court granted Pfizer's motion for summary judgment and determined that Pfizer did not qualify an "apparent manufacturer" under Maryland Law. The plaintiff filed a motion for reconsideration on the issue while also requesting the Court of Special Appeals of Maryland take judicial notice of additional documentary evidence, which it claims, contradicts Pfizer's contention that, both before and after its 1968 acquisition of Quigley, the marketing and promotional materials of Quigley included the plural designation "Manufacturers of Refractory Products." The court declined to do so, as the plaintiff did not claim they did not have the opportunity to present this evidence previously.

Upon review of the history of "apparent manufacturer" doctrine, the court noted three tests emerged from case law for determining whether an entity may be found to be an "apparent manufacturer": objective reliance test; actual reliance test; and the enterprise liability test, as set forth in Restatement (Third) of Torts: Products Liability, Sec. 14. cmt. a (1998). The objective reliance test is followed by a majority of state and federal appellate courts in determining reliance, that is, whether a reasonable consumer would have relied upon a label or advertising materials of a product in purchasing it. For the actual reliance test, the plaintiff must prove that he or she actually and reasonably relied upon the reputed apparent manufacturer's trademark, reputation or assurances of product quality, in purchasing the defective product at issue. The standard of the enterprise liability test is whether the defendant participated substantially in the design, manufacture, or distribution of the defective product at issue and that the defendant's trademark appeared on the product. It's important to note that the enterprise liability test only applies to trademark licensors.

The Court of Special Appeals of Maryland affirmed the circuit court's grant of summary judgment and concluded that the plaintiff failed to make its case that, under any of three tests, Pfizer should be deemed an "apparent manufacturer" of Insulag. Most notably, the court found all of the evidence indicated, both before and after its acquisition by Pfizer, Quigley manufactured and designed Insulag and sold it to Bethlehem Steel, without any significant participation by Pfizer. It was also noted that evidence established that Quigley shipped the product directly to Bethlehem Steel and Pfizer did not design, manufacture, or distribute Insulag, and that Insulag was manufactured by Quigley long before its acquisition by Pfizer.

Read the full decision here.

Summary Judgment Granted to Various Defendants For Lack of Product Identification Despite Inclusion in Interrogatory Responses in Take-Home Exposure Case

(New York, Supreme Court, Erie County, May 26, 2016)

In this case, it was alleged that the decedent was exposed to asbestos from laundering her husband, Eugene Blamowski's, work clothes. Mr. Blamowski worked as a laborer at Bethlehem Steel from 1955-84, with the exception of his Army service from 1958-62. He and the decedent were married in 1965 and the decedent had laundered his clothes since that time. Several defendants, including Frontier Insulation Contractors, Beazer East, Riley Power, Inc., and Buffalo Pumps, Inc., moved for summary judgment based on lack of product identification and argued that Mr. Blamowski could not show he was exposed to their products or work.

The court granted all of the motions. The decedent had died prior to testifying, but prior to her death she signed interrogatory responses listing, either upon her information and belief or her attorney's information and belief, moving the defendants' names. During his deposition, Mr. Blamowski admitted that his wife never visited him at the plant and he did not identify any of the moving defendants or their products. In opposition to the motions, the plaintiff's counsel relied upon invoices, prior discovery responses and deposition testimony of other Bethlehem Steel workers. The court found that all the defendants had shifted the burden to the plaintiff, since some were improperly named in the interrogatory responses and others had demonstrated an absence of proof. Regarding the interrogatory responses, the court cited the Matter of Eighth Jud. Dist. Asbestos Litig. [Gorzka] 28 AD 3d 1191 (2006) and held: "[T]he failure of plaintiffs to name [defendant] as a supplier in their responses to interrogatories constitutes an admission that [defendant] was not a source of an asbestos-containing product to which plaintiff was exposed and [defendant] thus established that plaintiff's action against it has no merit." Regarding the evidence the plaintiff relied upon in opposition to the motions, the court cited *Diel v. Flintkote Co.*, 204 AD2d 53 (1st Dept. 1994) and held: "It is insufficient to show that a defendants' products were "'… .seen in the plant; it must be shown that plaintiff was exposed to asbestos fibers released from defendant's products."

Read the full decision here.

Summary Judgment Granted to Cleaver Brooks Because Vague Witness Testimony Not Enough to Establish Exposure

(U.S. District Court for the Southern District of California, May 24, 2016)

The decedent in this case, Michael Walashek, alleged exposure to asbestos from various products, including Cleaver-Brooks boilers, during the course of his work for various entities between 1967 and 1986. The exposure allegedly caused him to "suffer severe and permanent injury and ultimately death." The plaintiff, Gail Walashek, subsequently filed a lawsuit against the defendant Cleaver-Brooks, Inc. and other entities alleging claims of negligence and strict liability in the U.S. District Court for the Southern District of California. Following discovery, the defendant moved for summary judgment, alleging that the plaintiff failed to establish "some threshold exposure" to its asbestos-containing boilers.

The District Court granted summary judgment in favor of the defendant. In doing so, the District Court cited, *inter alia*, the the following: (1) testimony of a former superior of the decedent who recalled sending him to work on the defendant's boilers somewhere in Eastern Washington "but could not recall" the specific job sites; (2) another witness' testimony about working on boilers with the decedent at an Ore-Ida potato factory who testified that he would be "guessing" the boiler brand they worked on there; and (3) a third witness' testimony about a "vague memory" of the defendant's boilers being on Coast Guard ships he worked on along with Decedent. Based on the summarized evidence, as well as vague interrogatory responses on exposure, the District Court found that the defendant carried its initial burden of production. The District Court then noted that the plaintiffs failed to produce enough evidence to generate an issue of material fact, which the plaintiffs had largely based on the Coast Guard ship "vague memory" testimony. It was found that the ship testimony was "not of 'sufficient quality to allow the trier of fact to find the underlying fact [of threshold exposure to asbestos attributable to the defendant] in favor' of Plaintiffs."

Read the full decision here.

Summary Judgment in Favor of the U.S. Government Reversed as Finder of Fact Could Reasonably Conclude Naval Facility Asbestos Exposure was Substantial Factor in Causing Plaintiff's Mesothelioma

(U.S. Court of Appeals for the Ninth Circuit, May 16, 2016)

Plaintiff Roger Botts, a former deliveryman who developed mesothelioma after being around work which exposed him to asbestos, including the removal, installation, and fabrication of asbestos on board ships and around the Puget Sound Naval Shipyard between 1970 and 1976, sued the United States Government in the U.S. District Court for the Western District of Washington. The government subsequently filed a motion for summary judgment asserting that the plaintiffs had not proven causation. In granting summary judgment, the District Court found that the plaintiffs failed to produce from which a finder of fact could reasonably conclude "that asbestos exposure at the Puget Sound Naval Shipyard…resulting from violation of the Navy's mandatory rules [as to the containment of asbestos] after March 1970 was a substantial factor in causing Roger Botts' mesothelioma." The plaintiffs' appealed the District Court ruling.

On appeal, the U.S. Court of Appeals for the Ninth Circuit reversed the District Court's ruling. In doing so, the Ninth Circuit found that the plaintiffs did, in fact, produce evidence from which a finder of fact could reasonably conclude that Roger Botts' exposure to asbestos at the Puget Sound Naval Shipyard following violations of the Navy's mandatory rules after March 1970 was a substantial factor in his getting mesothelioma. The Ninth Circuit pointed to several points of evidence in the record in support of its position, including that "Navy personnel did not comply with the containment regulations [for asbestos] after they came into effect in March 1970, and that, had the containment regulations been complied with, the volume and spread of asbestos fibers on ships due to just removal and cleanup activities would have been reduced by 90%[,]" that asbestos removal, installation, and fabrication "took place both on board ships and around the shipyard while Botts made deliveries to the shipyard from 1970 to 1976[,]" that violations of the Navy's asbestos containment regulations began in March 1970, and there is evidence that, from 1970 to 1976, Botts spent as much as 20 percent of his working time each year at the shipyard, and that, relatedly "[t]here was expert testimony that working for less than a year in total in a shipyard during [that] time period could result in anywhere between a two- to-eight-fold increase in the risk of developing mesothelioma due to asbestos exposure."

Accordingly, the Ninth Circuit found that the plaintiffs provided sufficient evidence of causation, reversed the District Court's grant of summary judgment, and remanded the case for further proceedings.

Read the full decision here.

Trial Court Denies Mechanical Contractor's Motion for Summary Judgment Opposed by Co-Defendants

(Supreme Court of New York, New York County, May 5, 2016)

The plaintiff sued the defendants for his mesothelioma allegedly contracted from his work at the Northpoint Power Station in Northport, Long Island. Mechanical contractor, O'Connor, moved for summary judgment as to the plaintiff's claims and cross claims. The motion was opposed by co-defendants National Grid and National Grid USA Service Company.

O'Connor maintained that summary judgment is appropriate because the plaintiff did not identify O'Connor in his Interrogatories and deposition testimony. However, the co-defendants opposed, stating that their affidavits submitted create a sufficient issue of material fact. Further, the co-defendants pointed out that O'Connor had agreed to a contractual indemnification for wrongful conduct.

The facts told that O'Connor worked on Units 1 and 2 of the powerhouse. The co-defendants argued that the plaintiff's testimony placed him in the boiler room at Units 1 and 2. The plaintiff believed he had been exposed to asbestos while workers were installing water lines nearby. The co-defendants relied heavily upon O'Connor's specific work and monthly progress reports whereby O'Connor had installed and insulated dust collectors. Specifically, the progress reports showed that O'Connor had used asbestos products. O'Connor contends that the reports "do not reflect that plaintiff himself worked at the power station," but rather the reports only show employers who worked there. Further, O'Connor argues that it was not involved with boilers or piping of water lines. Additionally, O'Connor tried to raise inconsistencies in the plaintiff's social security statements. The court rejected this portion of the argument as untimely.

The court reminded that the standard for summary judgment includes submitting supporting affidavits. The court was not persuaded by O'Connor's argument and found that O'Connor tried to use gaps in the plaintiff's testimony to establish no dispute of material fact. Specifically, the court was troubled by O'Connor's lack of affidavit proffering "the dates that O'Connor worked at the power station" and that O'Connor did not submit an affidavit attesting that it did not use asbestos at the powerhouse. Although the court acknowledged that the evidence against O'Connor was weaker than perhaps other co-defendants, the motion was nevertheless denied.

Read the full decision here.

California Appeals Court Applies "Inevitable Use" and Reverses Grant of Summary Judgment as to Brake Arcing Defendant

(Court of Appeal of California, First Appellate District, Division Four, May 9, 2016)

The appellant brought an appeal on behalf of her late husband, Frank Rondon, arguing that the trial court erred in its grant of summary judgment as to her claims for strict liability and negligence. Frank Rondon worked as a mechanic using defendant Hennessy's (Ammco Tools) brake arcing machines designed to grind asbestos brake shoes.

Hennessy moved for summary judgment, arguing that it did not manufacturer, distribute, or design asbestos containing products. Hennessy relied upon expert declarations that non-asbestos brake show linings were available in the 1960s and 1970s. Another expert declaration submitted to the court argued that the arcing machines were designed to grind brake shoes of any composition, not just asbestos brake shoes. Moreover, Hennessy argued that two recent decisions, *Shields* and *Bettencourt*, were different than the instant case because the facts illustrated that the machines were not "designed exclusively to be used with asbestos containing brakes." Appellant opposed the motion for summary judgment, stating that the "inevitable use" of the arcing machines was to grind asbestos. Appellant also submitted declarations that contended that non-asbestos brakes were limited in use prior to 1980. Another declaration included the assertion that Hennessy started to supply an asbestos dust collector bag in 1973.

The trial court fund that Rondon could not establish that the grinders were made to be used exclusively and inevitably with asbestos brakes. However, the Appellate Court reversed.

As to the strict liability claim, the Appellate court analyzed several cases, specifically the O'Neil case, and held that O'Neil's "exclusive use" is not required but rather a showing of "inevitable use" is required. The court honed in on the question of whether the intended use would inevitably expose Mr. Rondon to asbestos considering that 95-99 percent of the brakes being grinded contained asbestos. The next question becomes whether that created a hazardous condition according the court. The court concluded that the "normal" operation of the grinders inevitably caused the release of asbestos dust. The court also analyzed the *Tellez-Cordova* decision and pointed out that in O'Neil the products at issue, valves and pumps, did not necessarily create the dust that injured the claimant in that matter. However, in the instant case, the equipment itself, i.e., the defendant's grinders created the dust. Also relying on a decision from *Sherman*, the court noted that an economic benefit was gained by Hennessy for the use of its product. Consequently, Rondon should be permitted to prove her claims that Hennessy is strictly liable for the hazardous condition.

As for the negligence claims, the court outlined seven factors it reviews to determine whether a duty of care exists. The Appellant relied heavily on foreseeability, the first factor. The court stated that Hennessy "knew that the normal and intended use of its grinders was to grind brake linings, the vast majority of which contained asbestos" and concluded foreseeability in the Appellant's favor. Hennessy argued that the third factor, the connection between Hennessy's conduct and Rondon's injuries was tenuous. Despite Hennessy's contentions, the court found that a duty of care existed. However, that alone does not render Hennessy negligent according to the court. Factual issues existed that warranted an additional finding by the trial court.

Read the full decision here.

U.S. District Court Denies Plaintiffs' Motion for Reconsideration on Grant of Summary Judgment as to Daubert Challenge, Worker's Compensation Exclusivity, and Public Nuisance Claim

(U.S. District Court for the Western District of Wisconsin, May 5, 2016)

The plaintiffs brought a motion for reconsideration for the court's decision to grant partial summary judgment as to the defendant Weyerhauser's motion as to its Daubert challenge, The plaintiffs' claims for Worker's Compensation Exclusivity and public nuisance claim.

The court stated that Rule 56 does not provide for a motion for reconsideration but permits a motion to alter judgment. However, the standard requires the movant to show a "manifest error" in judgment or that newly discovered evidence is available. The court noted that the rule is not meant to allow parties to re-litigate matters. Instead, the rule is designed to prevent a flurry of motions similar to ones that the plaintiffs' counsel had filed.

As for the Daubert challenge, the plaintiffs argued that the court erred in its view of the evidence as to certain the plaintiffs' exposure to asbestos as a result of take home exposure from family members' work clothes. One specific plaintiff challenged the court's finding that his delivery of milk to a dairy near the plant at issue for seven days a week for twelve years was insufficient for the plaintiffs' experts to opine that his exposure was substantial contributing factor in the development of his alleged disease. The court noted that the plaintiffs' experts lacked epidemiological studies and therefore had no foundation for the plaintiffs' experts to testify that his deliveries would have exposed him to levels sufficient to rise to substantial contributing factor. Additionally, the court found that the plaintiffs did not address substantial contributing factor but rather relied on the plaintiff's alleged exposures as a "factor." Finally, the plaintiffs contended that the court erred in its interpretation of substantial contributing factor. Relying on the *Zelinski* case, the court found no error.

The court then reviewed the plaintiffs' argument that summary judgment should not have been granted as to the Worker's Compensation Exclusivity Provision. The plaintiffs argued that the court should not have limited its review to the exposures of the actual worker who was alleged to have brought asbestos home on his clothes but rather should

have extended its review to the family members too. At best, the court found the plaintiffs' contentions confusing and declined to extend the review to the family members as it found that the provision was limited to occupational exposure only.

Finally, the court reviewed the plaintiffs' argument that summary judgment should not have been granted on their public nuisance claim against Weyerhauser. The court quickly dispensed of the argument and found that the plaintiffs failed to preserve that issue because they had not responded to the defendant's contention that required Weyerhauser to have a possessory interest or property right for the nuisance claim to apply. The plaintiffs solely relied on the Restatement of Torts and one case cited in their motion. The court was not persuaded.

The court denied the plaintiffs' motion as to all three issues.

Read the full decision here.

Issue of Foreseeable Duty to be Determined by a Jury in Take-Home Exposure Case Against Plant Where Decedent's Husband Worked

(Court of Appeal of Louisiana, Fourth Circuit, May 4, 2016)

The plaintiffs' decedent, Elizabeth Sutherland, alleged take-home exposure to asbestos from her first husband's work clothes. The plaintiff's first husband, James "Huey" Chustz, worked as an electrician helper for Hershel Leonard Jr. Electric Company from 1964-72. At minimum, he spent 250 days at the sugar mill Alma Plantation, LLC, where he would become covered in dust from coming into contact with pipes. After dismissal of various parties and claims, the only claim remaining against Alma was if it owed a foreseeable duty to the decedent. Alma moved for and was granted summary judgment on this issue and the plaintiffs appealed.

The plaintiffs' appeal was granted. The court reviewed Mr. Chustz's testimony regarding the dirty conditions of Alma and his clothing from working there. The court also reviewed numerous articles presented by the plaintiffs on the dangers of asbestos in the workplace, invoices showing asbestos-containing products purchased by Alma, and the affidavits of industrial hygienist Steve Hays and pulmonary expert Dr. John Maddox. Mr. Hayes' affidavit set forth how Mr. Chustz would have been exposed to asbestos that he would have brought home and Dr. Maddox's affidavit set forth how decedent's "cumulative asbestos exposures caused this lethal malignant pleural mesothelioma."

In its ruling, the court stated: "Plaintiffs presented evidence in opposition to Alma's Motion for Partial Summary Judgment to demonstrate that Mrs. Sutherland may have been exposed to asbestos dust, that her death was caused by an asbestos-related illness, and that there was industrial knowledge of the dangers of asbestos and take home exposure. As noted by the U.S. District Court from the Middle District of Louisiana regarding the Walsh-Healy Act, "the Louisiana Supreme Court has found that the act evidences 'a level of knowledge that pervaded the industry' and shows 'a growing understanding and awareness of a serious problem regarding asbestos.'" *Catania v. Anco Insulations, Inc.*, 05-1418-JJB, 2009 U.S. Dist. LEXIS 107375, 2009 WL 3855468, at *2 (M.D. La. Nov. 17, 2009) [*13], quoting Rando, 08-1163, pp. 28-29, 16 So. 3d at 1086-87. Genuine issues of material fact remain that would assist in determining whether an alleged duty of Alma to Mrs. Sutherland was foreseeable, given the unique facts and circumstances in this case. As such, we find, like the Louisiana Supreme Court found in *Kenney*, that a trial on the merits is necessary and would assist in determining whether Alma owed Mrs. Sutherland a duty. Accordingly, we reverse the judgment of the trial court and remand for further proceedings consistent with this opinion."

Read the full decision here.

Summary Judgment in Favor of Supplier of Insulation Affirmed on Strict Liability, But Reversed on Failure to Warn

(Court of Appeals of Ohio, Eighth Appellate District, Cuyahoga County, May 5, 2016)

In this case it is alleged that the decedent, Ian Blandford, was exposed to asbestos while working as a pipefitter from 1955 to 1998. The Edward R. Hart Company (Hart) moved for and was granted summary judgment. The plaintiff appealed.

On appeal the court affirmed the trial court's granting of summary judgment on strict product liability, but reversed the granting of summary judgment on the failure to warn claim. Regarding strict product liability, the court pointed out that Hart was a supplier of asbestos insulation, not a manufacturer. Under Ohio law, a supplier can be strictly liable when the manufacturer of the product is not subject to judicial process in the state and the claimant would be unable to enforce judgment against the manufacture due to actual or asserted insolvency. Owens Corning, the manufacturer of the insulation supplied by Hart, had filed for bankruptcy in 2000. The court held that the bankruptcy did not prevent Owens from being subject to judicial process. Regarding insolvency, the court held: "although Owens Corning voluntarily filed bankruptcy in October 2000, 'today [it] is a fully functioning corporation with a trust worth over $1 billion in assets and $8.9 billion in asbestos reserves.'"

On the failure to warn claim, the court set forth that to hold a defendant liable it must be shown there was a duty to warn, that duty was breached, which proximately caused the injury. A supplier will be held liable if the supplier "(a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and (b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and (c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous." The court went on to review the evidence of the case and held: "appellants pointed to specific evidence establishing that genuine issues of material fact remain regarding (1) Hart's knowledge about the dangers of asbestos, (2) whether Ian was exposed to asbestos-containing products supplied by Hart, and (3) whether those products were a substantial factor in causing Hart's mesothelioma. Accordingly, we find that genuine issues of material fact remain regarding whether Hart was negligent for failing to warn about the dangers of asbestos."

Read the full decision here.

Highest New York Court Refuses to Pierce Corporate Veil, Citing Lack of Evidence Establishing Ford USA's Part in the Chain of Distribution of Ford UK Products

(New York Court of Appeals, May 3, 2016)

The plaintiff alleged exposure to asbestos-containing brakes, clutches and engine parts while working on Ford tractors and passenger cars in Ireland. The plaintiff and his wife brought suit after he developed peritoneal mesothelioma. Ford USA moved for summary judgment, arguing the parts to which the plaintiff alleged exposure were manufactured, distributed and sold by its wholly-owned subsidiary, Ford UK. Ford USA further argued the complaint was devoid of allegations supporting the claim that the court should pierce the corporate veil. While there was no basis for piercing the corporate veil, the Appellate Division nevertheless held that there were factual issues concerning whether Ford USA could be found directly liable and denied Ford USA's motion. The Court of Appeals reversed.

The court summarized the law of strict liability, stating that it is the manufacturer alone who can fairly be said to know and understand when an article is suitably designed and safely made; however, retailers and distributors may also be strictly liable because they have a continuing relationship with the manufacturers and are in a position to exert pressure for improved safety. The plaintiffs argued a question of fact existed concerning Ford USA's role in the chain of distribution, in that the evidence established that Ford USA played a direct role in the design and marketing of asbestos parts. However, the record evidence showed that Ford UK, not Ford USA, manufactured and distributed the Ford tractor and vehicle parts. Although the plaintiff's evidence showed Ford USA providing guidance, this alone was insufficient for strict liability. Further, Ford's world-wide trademark did not contain directives on what warnings, if any, should be placed on packaging.

While Ford USA could exert pressure on Ford UK, this concept had never been applied to a wholly-owned subsidiary, but instead was routinely applied to sellers, as the sellers were in the best position to pressure manufacturers for safer products. "Ford USA, as the parent corporation of Ford UK, may not be held derivatively liable to the plaintiff under a theory of strict products liability unless Ford USA disregarded the separate identity of Ford UK and involved itself directly in that entity's affairs such that the corporate veil could be pierced…a conclusion that neither Supreme Court nor the Appellate Division reached in this instance."

Read the full decision here.

Summary Judgment Reversed on Appeal for Brake Shoe Grinder Manufacturer on the Basis of Foreseeable Hazard With Inevitable Use and Normal Operation of its Non-asbestos Containing Product

(Court of Appeal of California, First Appellate District, Division One, April 28, 2016)

The plaintiff's decedent, who developed breathing difficulties and lung damage as a result of asbestos exposure, filed a lawsuit in state court alleging that from approximately 1958-62, he was a mechanic who utilized brake shoe arcing machines (known as "grinders") manufactured by the defendant for the purpose of grinding down/reshaping the friction material of brake shoes via mechanical abrasion. When a grinder came into contact with a brake shoe which contained asbestos in is lining, it would release asbestos into the air. Accordingly, it was alleged that the defendant failed to warn about the dangers of using its grinders on asbestos-containing products. The trial court granted summary judgment to the defendant after it established that there was no evidence that its grinders required asbestos-containing brake pads to function and that its grinders worked on all brake linings, regardless of whether or not they contained asbestos. In doing so, the trial court found that the defendant owed no duty to warn of risks created by third parties. The plaintiff appealed alleging that a triable issue of fact had been raised concerning the defendant's failure to warn.

The First Appellate District agreed with the plaintiff and reversed the trial court's ruling. In doing so, it cited a string of recent appellate rulings, some specifically involving the defendant, in which it was found that where the alleged sole and intended purpose of a particular product were one in which a foreseeable hazard resulted, the "inevitable use" and "normal operation" of that product made it reasonable to expect the manufacturer to provide warnings. The cases distinguished between products such as grinders, which "invariably" resulted in the generation of asbestos dust by their ordinary use, and products such as asbestos-containing pumps and valves, the normal operation of which would not "inevitably cause the release of asbestos dust." In support of is position, the First Appellate District noted that it had been established that 90 to 95 percent of the original equipment market brake linings and virtually 100 percent of the aftermarket brake linings contained asbestos as of 1986, more than 20 years after the decedent had reshaped them with grinders. Therefore, even though the defendant noted that some non-asbestos containing brakes were available between 1958 and 1962, "they were only in limited use." The First Appellate District further noted evidence that the grinders "were designed for passenger cars and vehicles, 'the vast majority of which contained asbestos from the 1960's to the mid-1970's.'" It concluded its decision by embracing a policy argument raised in a substantially similar case which held that "[b]ecause the manufacturer derives an economic benefit from use of its product with certain other products, and 'the combined use of the tool with those products inevitably created a hazardous condition, it was fair to require the tool manufacturer to share liability for the resulting injuries.'"

Read the full decision here.

Boilermaker Contractor Granted Summary Judgment Over Past Employee as No Proof Existed of Exposure Outside of His Work Directly for Contractor

(U.S. District Court for the Southern District of California, April 25, 2016)

The plaintiffs filed a wrongful death and survival action claiming their decedent, Michael Walashek, developed mesothelioma from his work as a career boiler maker from 1967-86. The plaintiff's social security records listed his employers FBS, Inc. and Camass Company, along with others. The case was removed to federal court and FBS, Inc. moved for summary judgment. Previously, a gasket manufacturer and cloth manufacturer moved for and were granted summary judgment. A summary of that decision can be found here.

Specially, FBS, Inc. argued that the plaintiffs' claims were barred by California's Workers' Compensation Act and the Longshore and Harbor Workers' Compensation Act. Additionally, FBS, Inc. maintained that the claims were barred by the sophisticated user doctrine. On the other hand, the plaintiffs argued that their decedent was exposed to asbestos by FBS, Inc. while working for co-defendant Camass. Therefore, the claims did not fall within the scope the Workers' Compensation Act with respect to FBS, Inc. as their decedent's alleged exposure occurred while working at Camass by other FBS, Inc. employees.

In granting the motion, the court held that the plaintiff failed to establish a disputed fact "with respect to whether Walashek was exposed to asbestos dust attributable to FBS, Inc. while employed by Camass." The plaintiffs' discovery responses did not purport any facts of exposure regarding FBS, Inc. exposing the plaintiff to asbestos during his work at Camass. The court noted that the burden shifted to the plaintiff. The plaintiff relied on the deposition testimony to attempt to establish that the plaintiff worked around FBS, Inc.'s workers onboard the USS Kitty Hawk and USS Constellation. However, the court found that there was no "reliable evidence" that the plaintiff was present when FBS, Inc. worked on the U.S.S. Kitty Hawk or U.S.S. Constellation. The court honed in on fact testimony from the plaintiff's brother suggesting that FBS, Inc. and Camass did not work together on projects as they were competitors. Also, the court recognized that another fact witness' testimony that multiple contractors may be on a ship simultaneously was speculative.

Accordingly, the court granted FBS, Inc.'s motion for summary judgment.

Read the full decision here.

Federal Court Analyzes New Jersey State Law in Granting Unopposed Summary Judgment Motions of Six Defendants

(U.S. District Court for the District of New Jersey, April 8, 2016)

In this federal court case, the plaintiff, James McCourt, alleged exposure to asbestos from serving in the Navy (1962-66), working as a pipefitter (1961-62 and 1966-68), home renovations (1952-60), automotive repair work (1959-98), and from the clothing of his father from products manufactured by various defendants. Six defendnats, Guard-Line, Inc., CertainTeed Corporation, Union Carbide Corporation, Exxon Mobil Corporation, PSEG Power, and DAP, Inc., moved for summary judgment.

While the plaintiff did not oppose the defendants' motions, the court still analyzed each motion under New Jersey law. In granting all six motions, the court held: "Defendants are entitled to summary judgment because Plaintiffs have failed to show there is any genuine issue of material fact bearing on each Defendants' liability. Plaintiffs have not produced any evidence through documentation or deposition testimony that identifies Guard-Line, CertainTeed, Union Carbide, Exxon, PSEG, or DAP as a source of Mr. McCourt's asbestos exposure. Plaintiffs have thus failed to demonstrate that Defendants manufactured, supplied, or distributed the asbestos-containing products which Mr. McCourt was exposed to on a frequent and regular basis while in a close proximity to it. Accordingly, Plaintiffs cannot establish a prima facie case that any of the Defendants caused or contributed to Mr. McCourt's illness, and Defendants Guard-Line, CertainTeed, Union Carbide, Exxon, PSEG, and DAP are entitled to summary judgment as a matter of law."

Read the full decision here.

Punitive Damages Not Allowed Against Bendix; Memos Showed a Corporation Struggling With Evolving Science on Asbestos and Mesothelioma

(U.S. District Court for the Middle District of North Carolina, April 4, 2016)

The plaintiff alleged that her husband was exposed to asbestos from brakes, and as a result died from mesothelioma. She sued Honeywell International, as successor-in-interest to Bendix, alleging negligence, breach of implied warranty, fraud, failure to warn, and wrongful death, and asked for actual and punitive damages. Bendix moved for summary judgment on the breach of implied warranty, fraud, and failure to warn claims, and punitive damages claims. The court denied summary judgment as to the breach of implied warranty and products liability claims, but granted summary judgment as to the punitive damages and fraud claims.

Regarding punitive damages, the plaintiff argued the lack of adequate warnings and the sale of defective replacement brakes was willful and wanton. Under North Carolina law, in the case of a claim against a corporation, the plaintiffs must demonstrate that officers, directors, or managers condoned the conduct constituting the aggravating factor giving rise to punitives. Here, the court noted: "The internal memos she proffers tend to show a corporation struggling to understand evolving scientific knowledge about asbestos and mesothelioma … and while they do not suggest Bendix was proactive, neither do these internal communications show an active "concealment or misrepresentation of

facts regarding the dangers of asbestos in the brakes." Summary judgment was granted on this claim. The plaintiff did not contest the summary judgment motion on the fraud claim, and it was likewise granted.

The plaintiff argued Bendix sold asbestos-containing brakes without adequate warnings, thus breaching the implied warranty of merchantability. The evidence showed that Bendix provided warnings from 1973-86 that breathing asbestos dust could cause serious bodily harm; these warnings did not include asbestosis, lung cancer, or mesothelioma, and there was a factual dispute regarding whether the warnings were prominently located. Although Bendix argued its warnings complied with OSHA standards, this was not conclusive evidence that the warnings were adequate. Thus, a genuine issue of material fact existed. Bendix also moved for summary judgment on negligence due to failure to warn, which was likewise denied.

The plaintiff also alleged a product liability claim based on inadequate design; Bendix argued this claim must fail because the plaintiff did not show a feasible alternative design through competent expert testimony. However, North Carolina law did not require expert testimony to prove defective design, but provided seven non-exclusive factors to consider. While the plaintiff did not produce evidence for all of these factors, she did make a sufficient forecast of evidence to survive summary judgment.

Read the full decision here.

Various Bits of Evidence Insufficient to Reverse Grant of Summary Judgment to Four Defendants

(U.S. Court of Appeals for the Fourth Circuit, March 30, 2016)

After the decedent was diagnosed with mesothelioma, he and his wife filed suit against 31 companies alleging asbestos exposure. The case was removed to federal court and transferred to the Eastern District of Pennsylvania MDL. Four defendants — Crane Company, CBS Corporation (Westinghouse), Goulds Pumps, and Air & Liquid Systems Corporation (Buffalo) — were granted summary judgment by the Eastern District of Pennsylvania MDL, and the plaintiff appealed. The Fourth Circuit affirmed.

The decedent was a marine machinist at the Charleston Naval Shipyard from 1972-95, working primarily on pumps and valves. He spent one year as an apprentice in Shop 31, and spent the rest of his time working out of Shop 38, which involved working both in the shop and on board ships.

The defendants first argued the Fourth Circuit lacked jurisdiction because the orders granting summary judgment were entered by the Pennsylvania court. The Fourth Circuit disagreed; the plaintiff did not appeal until the final judgment was entered by the District Court for the District of South Carolina.

Next, the court applied South Carolina law to the plaintiff's state-law tort claims, which consisted of the "frequency, regularity, and proximity" test. Regarding Crane, the plaintiff provided co-worker testimony stating that the decedent worked on Crane pumps. Despite this evidence, the plaintiff did not show that the decedent worked on Crane pumps containing asbestos, and the record was clear in that both asbestos and non-asbestos-containing gaskets, packing, and insulation were used. The only evidence offered by the plaintiff to show that Crane pumps contained asbestos were two advertisements. Regarding Westinghouse, while the plaintiff did show that the decedent worked with and around Westinghouse turbines in Shop 38, this work did not satisfy the frequency/regularity/proximity standard. While there was testimony stating that the removal of asbestos insulation from Westinghouse turbines on board ships created a fog of asbestos dust, this appeal only involved the decedent's work in Shop 38.

Regarding Goulds, the plaintiff relied primarily on circumstantial evidence in attempting to establish exposure; however, finding that the decedent worked with asbestos-containing Goulds products would require sufficient speculation. Finally regarding Buffalo, the plaintiff offered testimony of a co-worker that Buffalo was one of the main manufacturers of pumps. Even construing this to mean that Buffalo pumps were present in the decedent's work space in Shop 38, the plaintiff did not provide any evidence that the decedent worked on these pumps with frequency, regularity, and proximity.

The court stated: "In *Lohrmann*, this court declined to adopt the proposed rule that 'if the plaintiff can present any evidence that a company's asbestos-containing product was at the workplace while the plaintiff was at the workplace, a jury question has been established as to whether that product contributed as a proximate cause to the plaintiff's disease.'" Summary judgment was affirmed.

Read the full decision here.

Summary Judgment Overturned on Statute of Limitation Argument as No Proof Offered Linking Past Disease With Mesothelioma Diagnosis

(Supreme Court of New York, Appellate Division, Third Department, March 31, 2016)

In this take-home exposure case, the plaintiff was diagnosed with malignant epithelial mesothelioma (MEM) on or about August 5, 2010 and commenced her case against various defendants on November 5, 2012. After joinder of issue and discovery, several defendants moved for, and were granted, summary judgment, arguing that the plaintiff's action was time-barred pursuant to CPLR 214-c (2). Under this statute, "the three year period within which an action to recover damages for personal injury . . . caused by the latent effects of exposure to any substance or combination of substances, in any form, upon or within the body . . . shall be computed from the date of discovery of the injury by the plaintiff or from the date when through the exercise of reasonable diligence such injury should have been discovered by the plaintiff, whichever is earlier."

On appeal, the lower court's granting of summary judgment was reversed. The court was not swayed by the affidavit of defendants' expert pathologist that stated that the plaintiff had the same tumor in 2011 as had been discovered in 2003. As the court held: " the pathologist does not state that plaintiff only has the disease that was discovered in 2003 and, therefore, does not exclude the possibility that plaintiff later developed a separate and distinct disease. In addition, inasmuch as the pathologist failed to mention — much less opine on — MEM, there is no expert proof before us indicating what the symptoms of MEM are in order to permit a comparison of the symptoms to the proof regarding plaintiff's medical history."

Read the full decision here.

Plaintiffs' Evidence in Response to Two Defendants' Summary Judgment Motions Insufficient to Infer Exposure to Lifetime Boilermaker

(U.S. District Court for the Southern District of California, March 28, 2016)

The plaintiffs filed a wrongful death and survival action in state court; shortly thereafter defendants removed to federal court. The plaintiffs asserted negligence and strict liability claims from the death of their father/husband from malignant mesothelioma; the decedent was a career boilermaker. Defendants Lamons Gasket Company and Parker-Hannifin Corporation moved for summary judgment; both were granted.

The plaintiffs alleged asbestos exposure during the decedent's work on boilers and other equipment installed on naval, industrial, and commercial vessels. Lamons and Parker argued lack of exposure. In response to special interrogatories filed by Lamons, the plaintiffs failed to provide any specific facts regarding when, where, or how the decedent was exposed to asbestos-containing Lamons products. Co-workers identified by the plaintiffs did not provide any testimony regarding Lamons gaskets or other products. The plaintiffs attempted to create a genuine issue of material fact with the testimony of one co-worker, who assumed decedent worked with Lamons gaskets. The court found that "the mere 'possibility' of exposure does not create a triable issue of fact."

The court found the same with respect to Parker; the plaintiffs' discovery responses failed to identify any facts, documents, or witnesses establishing the decedent's exposure to Parker or Sacomo products. While the plaintiffs argued that Sacomo supplied asbestos-containing cloth to contractors working on the same ships as the decedent, close examination of such evidence revealed that decedent may have been exposed. This was insufficient to infer that the decedent was exposed to Sacomo cloth. The court stated: "This evidence 'creates a dwindling stream of probabilities that narrow into conjecture.'"

Read the full decision here.

Summary Judgment Granted in Favor of Defendant Company Pursuant to California's Workers' Compensation Act in Matter Involving 44 Years of Alleged On-The-Job Asbestos Exposure

(U.S. District Court for the Northern District of California, March 23, 2016)

The plaintiff filed a lawsuit in state court alleging that from 1956 to 1990, he was employed by the defendant and "spent a significant portion of that time 'dealing with asbestos, fiber glass products and other hazardous products.'" The three causes of action were for: (1) premises liability; (2) negligence; and (3) negligent infliction of emotional distress. The defendant removed the case to the Northern District of California and then moved to dismiss it on the grounds that California's Workers' Compensation Act provided the exclusive remedy for work-related injuries. The plaintiff, in response, filed an amended complaint wherein he and his wife alleged seven causes of action, including the three aforementioned causes of action, as well as: (4) products liability/manufacturing defect; (5) products liability/design defect; (6) products liability/failure to warn; and (7) loss of consortium.

The defendant first argued that all of the claims asserted in the amended complaint were barred under the "exclusive remedy provision" of the California Workers' Compensation Act. Under this argument, since the amended complaint alleged that the defendant was the plaintiff's employer, that plaintiff was exposed to asbestos products during the course of his employment, and that he developed injuries as a result of said exposure, the pertinent elements of the Act were met. The plaintiff countered the assertion by documenting his efforts to unsuccessfully secure the payment of compensation from any purported insurer of the defendant. He asserted that his failure allowed this case to fall into an area of California labor law which provides that "[i]f any employer fails to secure the payment of compensation, any injured employee or his dependents may bring an action at law against such employer for damages." In response, the defendant submitted a certificate of consent to self-insure that was issued to it in 1930 and had been in full force and effect ever since and requested that the court take judicial notice of same. The certification would take the compensation issue out of the purview of the pertinent labor laws.

The plaintiff also alleged "bad faith" as a result of the defendant's failure to respond to inquiries as to the workers' compensation claim and a claim under California's "dual capacity doctrine," which allows labor lawsuits to go forward in "narrow factual circumstances presented where the employee's injury was caused by the employer's product, which itself was provided to the employee not by the employer, but by an independent third person who obtained the product from the employer for valuable consideration."

The court dismissed the plaintiff's arguments in their entirety. It noted that the certification provided by the defendant did, in fact, leave the claim subject to the "exclusive remedy provision" of the California Workers' Compensation Act. Further, the court noted the plaintiff had not cited any authority for a "bad faith" exception to the "exclusive remedy provision" and that his allegations in the amended complaint were too "legally conclusory" and "not supported by any factual allegations" to suggest that the "dual capacity doctrine" would be applicable. The court accordingly expressly dismissed the first six causes of action, and did not address the loss of consortium claim, which necessarily had to be dismissed too. However, the court did grant the plaintiff leave to amend the complaint one additional time to assert a claim for fraudulent concealment. Such a claim, if established, is a recognized exception to the "exclusive remedy provision" and provides that "[w]here the employee's injury is aggravated by the employer's fraudulent concealment of the existence of the injury and its connection with the employment."

Read the full decision here.

Lack of Evidence Linking Decedent's Asbestos Exposure to Defendants Leads to Summary Judgment for Pump and Valve Manufacturers and Contractor

(U.S. District Court for the Northern District of Alabama, Northeastern Division, March 24, 2016)

The plaintiff, George Holland, brought this action on behalf of the decedent, Owen Holland, alleging exposure to asbestos from his work at Monsanto Chemical Plant from 1967–2004. From 1974-2002, the decedent worked with external components of pumps and valves manufactured by Goulds and Crane. He also would sweep packing from around the pumps and fibers from around the valves. Both Goulds and Crane moved for—and were denied—summary judgment. Defendant Fluor Daniel preformed construction and maintenance work at Monsanto from 1967-1998. Its motion for summary judgment was granted only in part and just the claims prior to May 19, 1980 were dismissed based on the statute of repose. The defendants appealed.

On appeal, all of defendants' motions were granted. Regarding Crane, the court held: "Simply put, George has failed to present any evidence showing that Crane was the manufacturer of any of the packing Owen worked around or that a particular shipment to Monsanto of Crane valves had asbestos in their original packing. As such, there is no evidence before the court linking Crane valves with original asbestos-containing component parts to the valves that Owen worked around. Without this evidence, no reasonable jury could conclude that Owen was exposed to asbestos fibers from a product manufactured, supplied, or otherwise placed into the stream of commerce by Crane. Accordingly, summary judgment in favor of Crane is warranted with respect to this alleged exposure."

Regarding Fluor Daniel, the court noted that the plaintiff relied on the testimony of a Richard May, who was not disclosed until eight months after the close of discovery. As the court held: "Accordingly, Mays' testimony is inadmissible and cannot form the basis to defeat summary judgment. Alternatively, even if Mays' testimony is admissible, it does not create a material dispute because Mays does not mention Owen directly, and he is not even certain if he personally worked with any asbestos insulation. Moreover, Owen's own testimony that he breathed in the dust generated by "Daniel" crews performing insulation work at Monsanto is speculative and conclusory. Accordingly, summary judgment is due in favor of Fluor Daniel." (internal citations omitted).

Regarding Goulds, the court held: "Based on the record before this court, the court finds that George has failed to present evidence that the Goulds pumps supplied to Monsanto were among the Goulds pumps with original asbestos-containing component parts. In fact, Owen testified that although he worked around Goulds pumps, he never worked on the internal parts of a pump, and that it was impossible to determine the manufacturer of the packing material that was removed from any of the pumps. Simply put, because Owen could not identify Goulds as the manufacturer of the packing to which he was exposed to during his employment at Monsanto, and in light of George's failure to present any evidence showing that a particular shipment of Goulds pumps to Monsanto had asbestos in their original packing, Goulds is due summary judgment with respect to this alleged exposure."

Read the full decision here.

Even Applying Relaxed Product Identification Standards of New York Law, Plaintiff Fails to Establish Exposure to Five of Six Defendants Moving for Summary Judgment

(U.S. District Court for the Southern District of New York, March 22, 2016)

The decedent, a lifetime electrician, passed away in 2014 of lung cancer. Prior to passing, he filed a lawsuit for asbestos exposure against numerous manufacturers. Six defendants filed motions for summary judgment arguing lack of exposure — Rockwell Automation (Allen-Bradley); BW/IP International (Byron Jackson); Air & Liquid Systems (Buffalo); Gardner Denver; Schneider Electric (Square D); and Warren Pumps. The court granted all motions, except that of Allen-Bradley.

The decedent claimed exposure to Warren pumps while serving as a civilian employee on board the U.S.S. Constellation. No testimony identified Warren pumps, but the plaintiff produced historical ship records for this ship identifying Warren pumps in the engine room. Regarding Buffalo, Byron Jackson, and Gardner Denver, no testimony identified Buffalo as the manufacturer of pumps on the two ships worked on by the decedent. After the close of discovery, the plaintiff produced one ship record identifying a Byron Jackson pump on board the U.S.S. Constellation, and one ship record identifying Gardner Denver pumps on the U.S.S. Lake Champlain, another ship on which the decedent worked. The decedent identified Square D products during the course of his work as an electrician and further identified Allen-Bradley products.

To establish a claim for liability under New York law, the plaintiff must prove exposure to the defendant's merchandise and that this exposure was more likely than not a substantial factor in his injury. Circumstantial evidence alone may suffice, but the plaintiff must show some circumstantial evidence that he was at the approximate time and place during which the defendants' products were used. Certain defendants also argued that the plaintiff's claims against them arose under maritime law.

Summary judgment was granted as to Warren. Evidence produced by the plaintiff identifying Warren after the close of discovery was not considered by the court because: (1) the plaintiff provided no explanation for the failure to disclose; (2) the evidence was important, yet substantially prejudicial, to Warren, and (3) while a continuance was

possible, to reopen discovery after its initial conclusion two years ago constituted an unwarranted delay. Further, although the plaintiff's claims arose under New York, not maritime, law, this was irrelevant because the plaintiff's claims against Warren failed under both.

Summary judgment was likewise granted to Square D. Although the plaintiff adequately described the Square D products at issue, "Balcerzak was simply unable to connect his exposure to any particular time, place, or employer, repeatedly speaking in terms of what 'could be' and linking it with 'one or all' of his many employers…This inexactitude far exceeds the leeway afforded asbestos plaintiffs under the law." Further, the plaintiff had no co-worker testimony to fill in any gaps.

Allen-Bradley's summary judgment was denied because Allen-Bradley did not argue that the plaintiff fell short of alleging a sufficient connection of its products to any time, place, or employer. The court also analyzed whether genuine issues of material facts were raised with respect to specific Allen-Bradley products.

Summary judgments for Buffalo, Byron Jackson, and Gardner Denver were unopposed and granted.

Read the full decision here.

Summary Judgment Affirmed Where Plaintiff Failed to Produce Sufficient Evidence of Asbestos Exposure

(Court of Appeal of California, First Appellate District, Division Four, March 18, 2016)

In this case, the plaintiff Melvin Desin, an electrician, alleged that he was exposed to asbestos while working at various job sites in the 1960s and early 1970s, including on seven or eight occasions in the vicinity of painters employed by defendant Zelinsky, a painting contractor. At his deposition, the plaintiff testified that he worked in close proximity to the Zelinsky workers, who patched and sanded walls and joint compound in his presence. However, the plaintiff could not identify the brand name, manufacturer, or supplier of any of the materials the Zelinsky workers used. He also could not recall any particular year when he worked around Zelinsky employees, or a specific instance in which the employees sanded walls.

Zelinsky moved for summary judgment on the basis that the plaintiff failed to produce any admissible evidence that he was exposed to asbestos products that it supplied, distributed, handled, or used. In opposition, the plaintiff submitted a declaration stating that when he worked in the vicinity of Zelinsky's employees, dust from joint compound would end up on his clothing, face and hair and on the job site floor. He also submitted an expert declaration by William Ewing, an industrial hygienist, which stated that joint compound products during that time period "nearly universally" contained asbestos and that the joint compound to which the plaintiff was exposed "more likely than not" contained asbestos. The trial court sustained defense objections to both the plaintiff's and Ewing's declarations and granted summary judgment in Zelinsky's favor.

The intermediate appellate court affirmed, noting that the plaintiff's own testimony established that he did not know if he had been exposed to asbestos by working in the vicinity of Zelinsky employees, that he could not identify a particular instance in which he worked around Zelinsky employees, and that he did not know the brand name, supplier, or manufacturer of any materials the workers applied or sanded in his presence. The plaintiff's discovery responses, identifying certain drywall products, did not establish that those products used by Zelinsky in the 1960s and 1970s actually contained asbestos or that the products were used on the seven to eight occasions that the plaintiff worked alongside Zelinsky employees. Further, Ewing's expert opinions lacked a proper foundation and could not "fill the gap" in the plaintiff's evidence. The court held: "[i]n the absence of admissible evidence that Desin was exposed to asbestos-containing products as a result of the activities of Zelinsky employees, we conclude plaintiff failed to carry the burden to show a triable issue of material fact."

Read the full decision here.

Summary Judgment Affirmed as Evidence of Asbestos Impurities in Auto Body Filler Only Equated to a Possibility of Asbestos Exposure

(Court of Appeal of California, First Appellate District, Division Five, March 15, 2016)

In this case, it was alleged that the plaintiff, John DePree, was exposed to asbestos from various products, including the use of Bondo auto body filler in the 1970s to repair dents in his cars. BASF Catalysts, LLC moved for, and was granted, summary judgment based on its argument that the plaintiffs could not offer more than a mere possibility of exposure to asbestos from a BASF product since any asbestos in the Bondo talc was an impurity and not an intended ingredient. The plaintiffs appealed.

On appeal, the trial court's ruling was affirmed: "In the absence of evidence that all or even most of the talc was contaminated with asbestos, plaintiffs could show only a possibility of asbestos exposure. Under California law, such a possibility is insufficient to support a finding in plaintiffs' favor on the issue of causation. Accordingly, we will affirm the judgment."

Read the full decision here.

Summary Judgment Overturned on Triable Issue as to Medical Monitoring of Plaintiff's Asbestos-Related Pleural Plaques

(Court of Appeals of California, First Appellate District, Division One, March 14, 2016)

In this federal court case, the plaintiff, Robert Hanson, filed a complaint in 2010 against various defendants, including "Doe" defendants, alleging asbestos exposure caused his asbestosis. In 2012, the plaintiff substituted Collins Electrical Company for one of the Doe defendants. In 2013, Collins moved for summary judgment, arguing that the plaintiff did not have any evidence of asbestosis or any asbestos-related injury. While the motion was pending, the plaintiff was allowed to file a first amended complaint, which removed any reference to asbestosis and claimed plaintiff suffered from "asbestos-related pleural disease." The plaintiff then opposed the summary judgment motion, arguing that the evidence submitted by Collins in its motion papers showed he was suffering from asbestos-related pleural disease. Collins responded by arguing that since there was no physical impairment resulting from the asbestos exposure, the plaintiff has not suffered an injury under California law and, as such, has no claim. The trial court subsequently granted Collins' motion for summary judgment.

On appeal, the court discussed the plaintiff amending his complaint while Collins' motion for summary judgment was pending and stated: "Hanson's first amended complaint both changed the nature of his claims (from asbestosis to 'asbestos-related pleural disease') and elaborated on his alleged damages, including for future risk of 'cancer' and 'emotional distress attendant thereto,' and future costs for 'X-rays, and other medical treatment.' Thus, the amended pleading changed the scope of the issues for purposes of summary judgment, and, in fact, Collins complained to the trial court that Hanson's pleural plaque claims were 'new.' Accordingly, Collins' motion for summary judgment should have been denied as moot, and the trial court should have granted Collin's request to 'file a new motion for summary judgment and/or summary adjudication based on the newly alleged facts.'"

However, the court went on to hold that there was no need to remand the case for further proceedings on summary judgment and reversed the lower court's granting of summary judgment. As the court held: "Thus, it could not be more clear that a plaintiff exposed to a toxic substance need not wait until he or she suffers actual 'impairment' before seeking damages for medical monitoring, provided he or she can 'demonstrate, through reliable medical expert testimony, that the need for future monitoring is a reasonably certain consequence of' the exposure 'and that the recommended monitoring is reasonable.' In short, the pivotal 'damage' sustained by such a plaintiff is the 'reasonably certain need for medical monitoring.'" (internal citations omitted).

Read the full decision here.

Federal Court Applies Bare Metals Defense in Finding Boiler Manufacturer Not Liable for Asbestos Supplied by Third Parties

(U.S. District Court for the Western District of Wisconsin, March 10, 2016)

After the plaintiff's husband died from lung cancer, the plaintiff filed a lawsuit alleging strict liability and negligence due to asbestos exposure from his work insulating and maintaining boilers. It was transferred to the Pennsylvania MDL, then remanded back to Wisconsin federal court. Defendant Trane U.S., Inc. then moved for summary judgment, arguing: (1) it did not assume the liabilities of American Standard, and (2) American Standard did not manufacture, distribute or specify the asbestos materials that caused decedent's injuries. The court granted the

motion on the second ground; under the "bare metals defense," Trane could not be held liable for injuries caused by products it did not manufacture, distribute, or specify to be used.

First, the plaintiff's strict liability claim failed because the trial judge found that American Standard was not the manufacturer or seller of asbestos materials to which the decedent was exposed. Second, the court looked to Wisconsin law in determining the plaintiff's negligence claim likewise failed. The plaintiff argued that American Standard's duty of care required it to warn the decedent about harms associated with third parties' asbestos products, because it was foreseeable that contractors and maintenance workers would use such materials on American Standard boilers. However, Wisconsin law has rejected the proposition that a defendant's duty of care is tied to whether the plaintiff's alleged harm was foreseeable. Further, individuals have no obligation to prevent harms that may or will befall others, regardless of the foreseeability of such harms, unless those harms are in some way attributable to the individuals' conduct. "Courts in Wisconsin have recognized consistently that a defendant's duty to warn is generally limited to the risks associated with its products, not the products of third-parties, regardless whether the use of those third-party products is foreseeable."

The court found that: "Here … the asbestos-containing products that harmed plaintiff were neither manufactured nor distributed by American Standard, and their dangerous propensities were not attributable to the fact that they were used in connection with American Standard's boilers. Moreover, there is no evidence that American Standard participated (either actually or constructively through some form of specifications) in integrating the asbestos-containing materials into the boiler. Accordingly, defendant cannot be held liable for failing to warn about the dangers associated with the third-party asbestos-containing products plaintiff handled."

Although the plaintiff pointed to manuals and deposition testimony requiring asbestos insulation, this evidence was inadmissible because the plaintiff offered no foundation. Further, limiting Trane's liability was consistent with Wisconsin public policy considerations; allowing recovery in this case would have "no sensible or just stopping point," and doing so would place too unreasonable a burden upon the tortfeasor.

Read the full decision here.

NYCAL Judge Denies Defendant's Motion for Summary Judgment on Product Identification and Other Grounds

(Supreme Court of New York, New York County, February 22, 2016)

In a February 22, 2016 decision, the Honorable Peter H. Moulton, J.S.C. of the Supreme Court of the State of New York, New York County denied the defendant's motion for summary judgment in a case where the plaintiff-decedent was allegedly exposed to asbestos during a lengthy career as a longshoreman on at certain New York City piers. During the pertinent period, the moving defendant was alleged to be the manufacturer of two asbestos-containing products (i.e., a pelletized product and a phenolic molding compound). The plaintiff alleged direct and bystander exposure to the aforementioned products arising from certain bags he allegedly came in contact with, or was in proximity to, in and around the piers during his employment as a longshoreman. The defendant moved for summary judgment, arguing, among other things, that there was a "lack of product identification and [a] lack of any evidence or expert opinion that exposure to [the defendant's] product caused [plaintiff-decedent's] illness and death." Specifically, the defendant pointed out, among other things, that neither the plaintiff-decedent, nor his co-worker, specifically identified the defendant's bags by name at the job sites at issue.

The court, however, determined that the defendant "failed to [meet] its burden to demonstrate that [its products] 'could not have contributed to the causation of [plaintiff-decedent's] injury.'" Here, the court outlined several factors in coming to its determination. It appears that the court relied on an exhibit that purportedly suggested that the defendant was "the only source of [the] pelletized" product at a certain point during the pertinent time period. Further, and while acknowledging that there was no testimony specifically identifying the defendant's product on the bags at issue at the jobsite at issue, the court pointed to evidence that the defendant purportedly shipped similar products to a company in close proximity to one of the piers at issue during the time frame that plaintiff-decedent worked there. These facts, along with other circumstantial evidence outlined by the court, were sufficient in the court's view to deny summary judgment.

Read the full decision here.

Mixed Rulings on Daubert Challenges and Motions for Summary Judgment by Employer on Employees' Non-Occupational Asbestos Exposure Claims

(U.S. District Court for the Western District of Wisconsin, February 19, 2016)

In this decision, there were eight separate actions against Weyerhaeuser Company involving private and public nuisance claims brought by, or on the behalf of, former employees of Weyerhaeuser for asbestos-related injuries based on non-occupational exposure. Weyerhaeuser used asbestos in its mineral core plant to manufacture a door core. The plaintiffs non-occupational exposure claims were based on their living, or being, in close proximity to the plant. Weyerhaeuser "moved to strike plaintiffs' experts and for summary judgment, arguing that plaintiffs are unable to prove injuries beyond those resulting from asbestos exposure on the job, for which they, their estates and spouses may only recover under worker's compensation laws."

In a mixed ruling, the court held: "For the reasons that follow, the court will grant defendant's Daubert and summary judgment motions with respect to plaintiffs Masephol, Prust, Seehafer, Heckel and Treutel, based on their failure to offer reliable evidence of significant, non-occupational exposure to asbestos. The court will, however, deny the same motions with respect to plaintiffs Boyer, Pecher and Sydow, finding that the latter three plaintiffs have produced sufficient evidence for a reasonable jury to find: (1) they not only worked, but lived for at least one year within a 1.25 mile radius of the plant that scientific studies suggest may meaningfully increase their risk of development mesothelioma; and (2) a qualified expert can testify reliably that this exposure constituted a significant, non-occupational asbestos exposure, which in turn substantially contributed to their respective mesothelioma diagnoses. The court will also grant defendant's motion for summary judgment on plaintiff's private nuisance claims, finding: (1) plaintiffs failed to put forth any evidence of a possessory interest; and (2) the discovery rule under Wis. Stat. § 893.52 does not apply. In all other respects, defendant's motions will be denied." Plaintiffs Boyer, Pecher and Sydow were allowed to proceed to trial on the public nuisance claims.

Read the full decision here.

In Fact-Intensive Unpublished Opinion, California Appeals Court Reverses Grant of Summary Judgment to Three of Four Automotive Defendants

(Court of Appeal of California, February 8, 2016)

In this unpublished opinion, the plaintiffs appealed after the trial court granted summary judgment to defendants Ford, Navistar, Gibbs International, and Kelsey-Hayes. The plaintiffs also filed motions for a new trial as to all four defendants, which the trial court denied. The decedent was a civilian employee at the Naval Construction Battalion Center; while he was not a mechanic, his visited the Construction Equipment Division (CED) where all vehicle repair work was performed. He died of mesothelioma. The appellate court reversed the summary judgments as to Ford, Navistar, and Kelsey-Hayes; it affirmed the judgment as to Gibbs.

The opinion contained an extensive recitation of the facts submitted by all parties. Heavy equipment mechanics testified as to the various repairs performed in the CED, and the brands of equipment. A worker in the purchasing department testified as to the brands of replacement parts. Decedent testified as to the repairs he witnessed. The plaintiffs' evidence showed that the decedent visited CED frequently. Co-workers testified as to equipment from Ford, Navistar (International), and Kelsey-Hayes.

Gibbs acknowledged that it sold some replacement parts to the port for Navistar vehicles. In support of its motion for new trial, plaintiffs submitted the expert declaration of an industrial hygienist, who stated that asbestos fibers remained in the air for quite some time. The plaintiffs also submitted a declaration stating that Gibbs was the port's main source for International replacement parts.

The plaintiffs argued that the defendants' evidentiary showing was insufficient to shift to the plaintiffs the burden to raise triable issues of fact. As to Ford, while it was possible that Ford products were a source of the decedent's asbestos exposure, the record was insufficient to allow such a finding by a preponderance of the evidence. Thus, the court agreed with the trial court that Ford shifted the burden of production to the plaintiffs. In so finding, the court cited various factually similar cases relied upon by the plaintiffs. The court then examined whether the plaintiffs met their burden to produce evidence showing a triable issue of fact as to Ford. The court noted: "In considering whether plaintiffs' showing is sufficient to raise a triable issue, we bear in mind that 'it is not enough to produce just some evidence. The evidence must be of sufficient quality to allow the trier of fact to find the underlying fact in favor of the party opposing the motion for summary judgment.'" Here, among other things, the plaintiffs submitted evidence that at one point up to 150 pieces of equipment were serviced in CED on a daily basis, and that Ford vehicles were in the

fleet. This evidence was sufficient to raise a triable issue of fact. The court found the same as to Navistar, and noted: "We recognize that this evidence is not overwhelming. As we have already explained, however, we must view the evidence in the light most favorable to the plaintiff." The court also found the same with respect to Kelsey-Hayes.

However with respect to Gibbs, the court found that the plaintiffs failed to meet their burden.

Read the full decision here.

Plaintiff's Failure to List Claims in Bankruptcy Petition Not Enough to Warrant Judicial Estoppel of Such Claims

(U.S. District Court for the Eastern District of Pennsylvania, February 5, 2016)

In 2000, the plaintiff brought claims for non-malignant asbestos-related diseases, including ship owners represented by Thompson Hine LLP. In 2004, the plaintiff filed for bankruptcy, without listing his asbestos claims as assets. Three months later the bankruptcy case was closed. In 2007, the plaintiff brought claims for a malignant asbestos-related disease; in 2011 the MDL reinstated asbestos actions, of which this case was a part. The defendant ship owners moved for summary judgment, arguing that (1) the non-malignancy claims were barred by judicial estoppel because the plaintiff failed to disclose them as assets in his bankruptcy filing, and (2) the plaintiff cannot pursue either asbestos claim because both are owned by the bankruptcy estate. The court denied this motion.

The court applied law of the Third Circuit in deciding both issues. In applying judicial estoppel, the test applied in the Third Circuit was: (1) the party to be estopped must have taken two positions that are irreconcilably inconsistent, and (2) estoppel was unwarranted unless the position was changed in bad faith, and (3) the court must not apply estoppel unless it was tailored to address the harm identified, and no lesser sanction would remedy the damage done by the litigant's misconduct. While the plaintiff's two positions were irreconcilably inconsistent, the failure to disclose was not done in bad faith, because the plaintiff could not have known the MDL would reinstate his dismissed asbestos claims.

However, regarding who owned these claims: "these claims are nonetheless part of the bankruptcy estate as they were not only potential claims, but were realized claims technically held in abeyance by the Court, and thus needed to be disclosed. Under these circumstances, the claims remain part of the bankruptcy estate and the trustee remains the real party in interest for such claims, even after the bankruptcy was closed." Even though summary judgment was denied, the court allowed time for the bankruptcy trustee to be substituted as the proper party. Regarding the malignancy claim, which was diagnosed after the plaintiff's bankruptcy, none of the cases cited by the defendants supported the argument that this claim was property of the bankruptcy estate, and summary judgment was denied on this issue as well.

Read the full decision here.

Several Defendants Not Named in Plaintiffs' Interrogatory Answers Move for Summary Judgment With Various Results

(Supreme Court for the State of New York, Eighth Judicial District Asbestos Litigation, February 1, 2016)

In this case, the plaintiff, Mark Denison, claimed exposure to asbestos from numerous products while working at his father's hardware store from 1964-65 to 1969, Dunkirk Radiator from 1972 to 1987, and from his own automotive repair business from 1980 to the early 1990s. Defendants Bird, Inc., Euclid-Hitachi Heavy Equipment, Inc., F.E. Myers, Oshkosh Corporation, and WT/HRC Corporation all moved for summary judgment.

In its ruling, the court highlighted that none of the moving defendants were identified in the plaintiffs' answers to interrogatories. The court went on to state: "The plaintiff's failure to identify defendants' products in their answers to interrogatories shifts the burden to plaintiff to come forward with facts and conditions from which defendants' liability reasonably can be inferred. (see *Gorzka,* supra, *Matter of Eighth Jud. Dist. Asbestos Litig. [Heckel],* 269 AD2d 749 [4th Dept, 2000] ; *Lang v Crane Co., [* Sup Ct, Erie County , March 30, 2015, Chimes, J. Index No. I 2012-202]; *Dickman v Trane U. S. Inc.,* [Sup. Ct, Erie County, September 16, 2010, Lane, J. Index No.2008-12697). However, plaintiffs are not required to show the precise causes of the damages sought, but, only required to show those facts and conditions, from which defendant's liability can be reasonably inferred. *(see Matter of Eighth Jud. Dist. Asbestos Litig. [Reynolds],* 32 AD3d 1268 [2006])."

In its motion, Bird argued that it made both asbestos and non-asbestos-containing roofing felt and the plaintiff testified to using the non-perforated felt, which was non-asbestos-containing. The court relied on the plaintiff's testimony and business records to deny summary judgment. As the court held: "This testimony, along with the business records from Bird revealing that not all Bird's asbestos-containing roofing felts were described as perforated and that little or no visible perforations were on its asbestos-containing felt, raises questions of fact. The motion for summary judgment is therefore denied."

The court granted Myers motion, relying on the affidavit of its chief engineer and over 400 company records that demonstrated that Myers did not make jet pumps for use with wells that had asbestos components as claimed by the plaintiff. In its ruling, the court noted: "In opposition, plaintiffs rely solely on Mr. Denison's deposition and trial testimony. However, his testimony is nothing more than speculation based on observations of fibers and particles that glittered. Plaintiffs have failed to sufficiently raise a triable issue of fact and defendant Myers' motion is granted."

WT/HRC had two products in the case, a cupola and cranes. It moved on behalf of both defendants and the court granted the motion regarding the cupola and denied the motion regarding the cranes. For the cupola, WT/HRC argued that it was not delivered to Dunkirk until 1975, which postdated the plaintiff's relevant exposure, it did not sell refractory products, and only recommend that non-asbestos refractory product be used with its cupola. As the court held: "Plaintiffs' opposition failed to show facts and conditions from which WT/HRC's liability can be reasonably inferred. Mr. Denison offered nothing more than speculation that he used or was exposed to asbestos while working at the cupola, which is insufficient to sustain plaintiffs' burden. WT/HRC's motion with respect to the cupola is granted." On the cranes, WT/HRC argued that it was not responsible for asbestos-containing replacement brakes or wiring and that while the crane's wiring contained asbestos, the wiring on the cranes plaintiff worked on were not original. The court found the argument on the original wiring to be speculative and disagreed with the argument that WT/HRC was not responsible for replacement parts. As the court held: "This argument however has been clearly rejected in both *Matter of New York City Asbestos Litig. [Konstantin/Dummitt],* 121 AD3d 230 (1″ Dept, 2014) and *Matter of Eighth Jud. Dist. Asbestos Litig. [Sunned,* (Sup Ct, Erie County, March 15, 2013, Lane, J., Index No. 2010-12499) *aff'd for reasons stated below* 118 AD3d 1369 (4′ Dept 2014) *lv granted* 24 NY3d 907 (2014). There is no evidence or basis presented in this case to depart from precedent."

Oshkosh's motion was granted, with the court holding: "It is uncontested that plaintiffs' only evidence of exposure to asbestos from an Oshkosh product, is his deposition testimony. As Oshkosh was not in the case at the time of the plaintiff's deposition, this testimony is inadmissible against Oshkosh. (See CPLR 3117; *Perkins v New York Racing Assn.,* 51 AD2d 585, 586([r^{d} Dept, 1976])."

Euclid-Hitachi's motion was based on its argument that the plaintiff testified to using Euclid brakes and clutches for on-road vehicles and that they only sold replacement brakes for off-road trucks. The court denied the motion stating "that in its answers to interrogatories filed in *Potter v A. W Chesterton,* an Eighth Judicial District case, Euclid-Hitachi admitted selling replacement parts for its heavy equipment (p.3 of Exhibit C of plaintiffs' opposing affirmation) and that prior to 1980, the replacement parts, including clutch facings and brake linings, may have contained asbestos *(id.* at 14). That Euclid-Hitachi sold asbestos-containing brake linings was testified to in 2001 by Clarence E. Eckert, Euclid-Hitachi's corporate representative in *Hilman Stubbefield,* a California case. Mr. Denison testified repeatedly about his use of Euclid's parts and described how his work with these parts caused him to be exposed to asbestos."

Read the full decision here.

Gasket Manufacturers' Motions for Summary Judgment and Motion to Change Venue Denied in Naval Exposure Case

(U.S. District Court for the Southern District of Illinois, January 28, 2016)

In this federal court case, the plaintiff alleged he was exposed to asbestos in various products through the course of his employment in the 1960s and 1970s. He specifically alleged asbestos exposure from working with gaskets manufactured by Excelsior Packing & Gasket Company and Goodyear Tire & Rubber Company while serving in the Navy from 1970 to 1975 aboard the U.S.S. Surfbird and U.S.S. Hector. On both ships, the plaintiff's duties included replacing gaskets on pumps, valves, and boilers. He testified to changing flange gaskets on pumps hundreds of times and identified both Goodyear and Excelsior, who moved for summary judgment.

The court denied both motions. Regarding Goodyear, the court held: "Plaintiff's testimony with respect to Goodyear gaskets establishes more than just minimal contact. For approximately three years, Plaintiff regularly maintained, repaired and installed gaskets. Goodyear admits that it manufactured asbestos-containing gaskets. Although Goodyear contends it ceased manufacturing asbestos-containing gaskets in 1969, records indicate that Goodyear

products were aboard naval vessels as late as 1973. The Court finds that there are material factual issues remaining in this case."

Regarding Excelsior, the court held: "Excelsior asserts that there is no testimony or other evidence to create a genuine dispute of fact regarding Plaintiff's exposure to any asbestos-containing products attributable to Excelsior. The Court disagrees. Plaintiff has provided evidence establishing 'frequency, regularity, and proximity' to Excelsior asbestos-containing products. Plaintiff specifically recalled using Excelsior prefabbed and sheet gaskets during his naval service. He described replacing countless number of gaskets on pumps, valves, and boilers. The process of installing gaskets created dust which he inhaled."

In another decision, the court also denied the motion of Ingersoll-Rand Company, which was joined in by defendants BorgWarner and Morse Tec, Inc., to transfer venue to the United States District Court for the District of Alaska pursuant to 28 U.S.C. 1404(a). In its denial the court stated: "Although Defendants argue that convenience and the 'interest of justice' dictate transferring this action to Alaska, other than Defendants' conclusory assertions and suppositions, there has been no showing that any witnesses or evidence are unavailable for trial in this district. Nor do Defendants claim that the reasons for which they now seek transfer have arisen only recently, and were not present from the beginning of the case. The Court finds Defendants' arguments particularly dubious given the length of time this case has been pending and the upcoming February 22, 2016, trial date."

Read the first decision here. | Read the second decision here. | Read the third decision here.

Post-Bankruptcy Petition Malignancy Claim Not "Sufficiently Rooted" in Pre-Bankruptcy Past to Constitute Property of the Estate

(U.S. District Court for the Eastern District of Pennsylvania, January 29, 2016)

In a follow-up to cases previously reported on in ACT, the plaintiffs in this case, Administrators of the Estate of Bjorn Dahl, alleged that the decedent, Mr. Dahl, was exposed to asbestos while working aboard various ships. The plaintiffs assert that the decedent developed two asbestos-related illnesses, a non-malignancy injury dating back to 1995 and a malignancy claim arising in 1997, as a result of his exposure to asbestos aboard those ships. In 1995, Mr. Dahl brought claims for non-malignant asbestos-related disease. Mr. Dahl's asbestos claim was dismissed administratively, leaving open the possibility for the action to be pursued at a later, unspecified date. Approximately one year after Mr. Dahl filed his first asbestos action and approximately one month after it was dismissed, Mr. Dahl filed for bankruptcy pursuant to Chapter 7 of the bankruptcy code, without listing his asbestos claims as an asset in the bankruptcy filing. The bankruptcy case was closed four months later. Thereafter, in September of 1997, Mr. Dahl was diagnosed with asbestos-related cancer, giving rise to a claim for a malignant asbestos-related disease. On February 7, 2011, approximately fifteen years after he was discharged from bankruptcy, and approximately sixteen years after Mr. Dahl first filed his asbestos action, the MDL Court reinstated Mr. Dahl's asbestos action, which had been dismissed by Judge Weiner in 1996.

The defendants moved for summary judgment, seeking dismissal of Mr. Dahl's non-malignancy and malignancy claims on following grounds: (1) The plaintiffs' non-malignancy claims are barred by way of judicial estoppel because Mr. Dahl failed to disclose the asbestos action as an asset in his bankruptcy filing, and (2) The plaintiffs cannot pursue any of the asbestos claims in the asbestos action, neither the initial non-malignancy claims nor his post-petition malignancy claims because the entire asbestos action is now owned by the bankruptcy estate. In terms of the non-malignancy claims, the court denied the defendants' motion on judicial estoppel grounds because there was no evidence that the Mr. Dahl changed his position "in bad faith" as required to meet the defendants' burden on the motion because a layman could not foresee that a court would reopen an asbestos case fifteen years after the bankruptcy filing. The court determined, however, that the non-malignancy claims were an asset of the bankruptcy estate and that only the Trustee could pursue that portion of the claim.

The court reached a different result on the defendants' standing argument for the malignancy claim, finding that "none of the cases relied upon by Defendants support the conclusion that Mr. Dahl's malignancy asbestos claims are property of the bankruptcy estate…given the facts of the present case, and the standard set forth by maritime law for determining accrual of an asbestos cause of action (including, specifically, its utilization of the "discovery rule"), Mr. Dahl's malignancy asbestos claims are not 'sufficiently rooted' in his pre-bankruptcy past to constitute property of the

bankruptcy estate…Mr. Dahl's malignancy asbestos claims (which did not accrue until after the bankruptcy petition was filed and after Mr. Dahl was discharged from bankruptcy) are, therefore, not property of the bankruptcy trustee (and not subject to pursuit by creditors in the bankruptcy action)."

Read the full decision here.

District Court Adopts Report and Recommendation of Magistrate in Both Granting and Denying Summary Judgment to Various Defendants

(U.S. District Court for the District of Delaware, January 26, 2016)

The district court reviewed the report and recommendations of the U.S. Magistrate Judge, which recommended granting and denying summary judgment to various defendants. The court applied maritime law in granting summary judgment to Electrolux, ABB, Velan Valve, GE, CBS, Foster Wheeler, and Owens-Illinois, and denying summary judgment to Buffalo, Ingersoll-Rand (denied in part), Aurora, IMO, and Warren (denied in part). The court granted summary judgment on the issue of punitive damages to Ingersoll Rand and Warren, because the plaintiff failed to establish same.

The court analyzed the objections of Buffalo, Aurora Pump, Ingersoll Rand, IMO, and Warren. All these defendants argued the plaintiff did not establish exposure to asbestos from their products. The plaintiff argued genuine issues of material fact existed regarding exposure. Arguments raised before the district court had already been raised with the magistrate. Thus, the court adopted the report and recommendations of the magistrate judge.

Read the full decision here.

Summary Judgment Awarded to Pump Manufacturer for Alleged Exposure to Pump Component Parts Manufactured by Third-Parties

(U.S. District Court for the Southern District of New York, January 21, 2016)

In *Holzworth v. Alfa Laval,* et al. 12-CV-06088 (S.D.N.Y. Jan. 21, 2016), Southern District of New York Judge John Keenan granted defendant Ingersoll-Rand's summary judgment motion arising out of the plaintiff's alleged exposure to asbestos aboard the U.S.S. Sheldrake. The plaintiff's decedent had testified that he was exposed to pumps aboard the ship as a bystander and by cleaning them. He did not specifically describe their pumps' composition, but claimed that he scraped asbestos-containing packing from the jackets. He further testified that many of the pumps had been refurbished, with components being replaced.

Ingersoll-Rand moved for summary judgment. Notwithstanding the fact that the motion was unopposed, the court analyzed whether any questions of fact existed with respect to the plaintiff's product liability claims.

The court first determined that no conflict of law existed between Maritime and New York law and then found that summary judgment was appropriate with respect to the plaintiff's negligence, strict liability, warranty, and warnings claims.

Turning first to the negligence, strict liability, and warranty claims, the court analyzed the plaintiff's complaint and interrogatory answers, but did not identify any specific allegations with respect to claims against Ingersoll-Rand. Next, the court found that the plaintiff did not identify any evidence of exposure to asbestos from a product "produced by Ingersoll." *Id.,* at p. 9. It was insufficient to merely show that the plaintiff was present aboard the ship that contained the defendant's pumps "that were wrapped in asbestos." *Id.,* quoting various cases. As a consequence, the court dismissed the warranty, negligence and design claims.

Turning to whether a duty to warn existed, the Court, citing New York law, evaluated whether the defendant "had any active role, interest , or influence in the types of products to be used in connection with its own product after it placed its product into the stream of commerce." *Id.,* citing *In re N.Y.C. Asbes. Litig.*, 121 A.D.3d 230 (2014).

Here, the court found that there was no duty to warn of a third-party's component parts where: "The Plaintiff has not provided any evidence to suggest that Ingersoll had any role, interest, or influence whatsoever in the products that the Navy used in connection with its pumps, much less that Ingersoll actively participated in, knew of, or manufactured products that necessitated the use of third-party asbestos-containing products. The Decedent's deposition testimony and interrogatory responses state only that Ingersoll manufactured cast-iron pumps. This

evidence, standing alone, does not raise a genuine dispute as to whether Ingersoll placed the asbestos-containing components into the stream of commerce played an active role in their use, or manufactured pumps that required such components."

In other words, since there was no evidence showing that "Ingersoll knew of or otherwise influenced the Navy's use of asbestos-containing materials produced by third parties, there is no genuine dispute as to any material fact relating to Ingersoll's lack of a duty to warn" of the dangers of third-party products.

Read the full decision here.

Foreseeability of Injury Nor a Special Relationship Existed to Create a Duty in Secondary Exposure Case

(Supreme Court of North Dakota, January 14, 2016)

The plaintiff contracted mesothelioma and sued various defendants for asbestos exposure allegedly sustained as a child. Kuettel performed industrial and commercial insulation contracting work; the plaintiff's father worked for Kuettel from 1961-65 and again from 1974-79. Kuettel moved for summary judgment, arguing it had no duty to warn the plaintiff because there was no special relationship between it and the plaintiff, and because it did not manufacture any of the asbestos-containing products it supplied and installed. The district court granted the motion because there was no special relationship between the plaintiff and Kuettel. The supreme court affirmed.

The plaintiff argued the court erred in granting the motion because it should have focused on the foreseeability of injury in its analysis of whether Kuettel owed a duty to the plaintiff. In deciding whether a duty was owed to a plaintiff in a secondary exposure case, courts focus on either the foreseeability of injury or the nature of the relationship between the parties. The plaintiff cited numerous cases holding a duty was owed to the plaintiff on the basis of foreseeability, which depended upon the employer's knowledge of the risk that employees could carry asbestos home to cause injury to others. "Here, regardless of whether the focus is on foreseeability of injury, relationship of the parties or a combination of both, Palmer has not raised any genuine issues of material fact that would preclude summary judgment. The evidence submitted by Palmer fails to establish a special relationship between Kuettel and Palmer or Kuettel's knowledge of the dangers of asbestos while Palmer's father was employed by Kuettel."

Read the full decision here.

Granting of Summary Judgment Upheld on Appeal; Court Rules Time to File Suit Began with Prior Diagnosis of Asbestosis Based on Virginia Statute of Limitations

(Superior Court of Pennsylvania, January 12, 2016)

The plaintiff in this case alleges that the decedent, Vincent Gatto, was exposed to asbestos while self-employed as a brick mason in Virginia. The decedent was diagnosed with asbestosis in 2003 and then with mesothelioma in 2010. The action was filed in 2011. Following the close of discovery, several defendants moved for summary judgment "based upon the Virginia statute of limitations, Va. Code Ann. § 8.01-243(A), which requires that an action for personal injury must be brought within two years after the cause of action accrues." The defendants argued that the cause of action accrued in 2003 when the decedent was first diagnosed with asbestosis. The lower court agreed and granted summary judgment. The plaintiff appealed that decision, arguing that the Virginia statute of limitations does not bar his claim.

The court upheld the granting of summary judgment by the lower court. Both parties agreed that pursuant to the Pennsylvania uniform statute of limitations on foreign claims act, 42 Pa.C.S. § 5521, the Virginia statute of limitations applies. The plaintiff argued that the statute of limitations did not begin to run in 2003 because the decedent was misdiagnosed with asbestosis. However, the court held: "Appellant does not dispute that Mr. Gatto was diagnosed with asbestosis in 2003. Also undisputed is that Dr. Miranda discussed the diagnosis with him. Clearly, too, Mr. Gatto was aware of the diagnosis, because he relayed that information to Dr. Everhart in 2005. These facts alone are sufficient to trigger the limitations period. Moreover, as the indivisible cause of action rule applies, the subsequent diagnosis of Mr. Gatto's mesothelioma did not commence a new limitations period. Accordingly, Appellant's cause of action is time-barred."

Read the full decision here.

In Case Where Steamfitter Worked on its Premises, Owner Denied Summary Judgment Based on the Wisconsin Safe Place to Work Statute

(U.S. District Court for the Eastern District of Wisconsin, January 7, 2016)

In yet another follow-up decision in the Ahnert case out of Wisconsin federal court, Pabst Brewing Company moved for summary judgment. As previously reported, Foster Wheeler was granted summary judgment, but insulation contractor, Sprinkmann Sons Corp. was denied summary judgment based on the Wisconsin statute of repose. The decedent was a union Steamfitter from 1955 to 1992 and claimed exposure to asbestos while working on Pabst's premises. In its motion, Pabst argued that there was no evidence that decedent was exposed to asbestos from any products on a premises owned, operated or controlled by Pabst.

The court, in denying the motion, looked to the Wisconsin safe place statute, Wis. Stat. 101.11, which imposes a duty on premises owners to "construct, repair, and maintain premises so as to make them safe for employees or 'frequenters.'" The court then looked to the testimony of the decedent's co-worker, Robert Wolter, who worked at Pabst the same time as decedent and testified to decedent working in the vicinity of pipe insulators installing kaylo pipe covering. The court concluded: "Taking the evidence in the light most favorable to the nonmoving party, as the court must at this stage of the litigation, there is evidence that creates a genuine issue of material fact under the safe place statute. Wolter testified that he worked with Daniel Ahnert at Pabst, and that Pabst employees were on site draining pipes. Further, the work of disconnecting, reconnecting, and reinsulating pipes created 'quite a bit of dust.' On the other hand, Pabst has produced no evidence to support a finding that it relinquished custody or control over the premises to any party during this time frame or that at the time of any relinquishment the premises were otherwise safe. Jack Wetzel, a deliveryman for Sprinkmann, testified that he made deliveries to Pabst between 1955 to 1972 approximately every three weeks and that he delivered asbestos-containing materials, including Eagle 66 cement, and about 75 percent of the materials were high temperature insulation materials." Read the full decision here.

Wisconsin Federal Court Applies Statue of Repose in Granting Summary Judgment to Foster Wheeler after Multiple Lawsuits Filed by Same Plaintiff

(U.S. District Court for the Eastern District of Wisconsin, January 5, 2016)

The plaintiff was a steamfitter who filed a lawsuit against Foster Wheeler and others due to asbestosis developed after alleged asbestos exposure. After this case was transferred to MDL 875, the plaintiff was diagnosed with mesothelioma and filed a second suit, again naming Foster Wheeler. After the plaintiff died, his wife dismissed the second lawsuit; three years later she sought to amend the MDL case to include the mesothelioma diagnosis, which the MDL denied due to time. Meanwhile, the plaintiff filed a third lawsuit in this court, naming both asbestosis and mesothelioma. After this case was filed, the MDL transferred the original case back to Wisconsin. Foster Wheeler filed a motion for summary judgment in the original case, which the court granted.

The plaintiff argued exposure to asbestos from a Foster Wheeler boiler present at the Oak Creek Unit 5 power plant and installed by Foster Wheeler in 1958. Enormous quantities of asbestos insulation was used on this unit. A co-worker testified that he worked with the plaintiff on this unit for six months in the 1980s.

Foster Wheeler argued that the Wisconsin Worker's Compensation Act was the plaintiff's exclusive remedy. Although the plaintiff's co-worker stated that Foster Wheeler was his employer, the plaintiff argued that Babcock & Wilcox was the decedent's employer at the time of exposure. Instead, the court applied the Wisconsin statue of repose in holding that the plaintiff's claims were barred because she had ten years from the date of installation to bring suit, and the boiler was a continuous improvement to real property.

The court stated: "The Wisconsin Supreme Court has explained that the statue of repose protects '*all* who are involved in the actual improvement of real property *to the extent they participated in improving the property*.'… On the other hand, the statute excludes material producers from protection when liability is based on the defective design or manufacture, which occurs prior to any involvement with the improvement… The statute protects those companies like Foster Wheeler who provided the specifications for the installation and actually installed the new equipment. Because Foster Wheeler was not the manufacturer or producer of any asbestos products, the statute applies."

It is noteworthy that at the outset of its opinion, the court discussed the fact that much of plaintiff's evidence surfaced for the first time through its opposition to Foster Wheeler's motion. In an attempt to create a genuine issue of material fact, the plaintiff filed a declaration contradicting the same witness's prior deposition testimony, which the court excluded as a sham. The plaintiff also produced "new" social security records that were never previously produced. The plaintiff conceded at oral argument that she knew of documents contradicting the dates of alleged exposure.

Read the full decision here.

Court Lacks Specific Jurisdiction Where Complaint is Devoid of Allegations that Injury Arose Out of Defendants' Contacts with State

(U.S. District Court for the Southern District of Illinois, January 6, 2016)

The plaintiffs' complaint alleged that John Clark was exposed to asbestos from the defendants' products while serving in the U.S. Air Force and during his employment at McDonald Douglas and Boeing. Multiple defendants made motions to dismiss, arguing that the District Court lacked jurisdiction over them. The plaintiffs failed to file timely responses to any of the motions and the court used it is discretion to construe the plaintiffs' failure to do so as an admission of the merits of the motion. In granting the motions, the court noted that the plaintiffs' complaint was devoid of allegations that the plaintiffs' alleged injuries arose out of or relate to the defendants' contacts with Illinois. As such, this court lacked specific personal jurisdiction over the claims against the defendants and the action was dismissed.

all four factors favored the application of Kansas law and pointed out that the focal point of the parties' relationship was the most important factor on the issue of liability in an asbestos-exposure case. As the court held: "Applying this reasoning here, it is clear that the relationship between Hennessy and Plaintiffs was centered in Kansas. Mr. New only came in contact with Ammco's products through his employment with various Kansas-based automotive part and mechanic shops. This particularly weighty contact tips the scales heavily in favor of applying Kansas law."

After determining that Kansas law applied, the court ruled that the plaintiff failed to satisfy the *prima facie* elements of the Kansas Silica and Asbestos Claims Act (KSACA). Under the KSACA, the court said: "…the plaintiff must show that he received 'a diagnosis by a competent medical authority that [his] asbestos-related cancer was proximately caused by asbestos exposure.' Kan. Stat. Ann. § 60-4902(c)(3). An individual qualifies as a 'competent medical authority' if, among other things, he 'has or had a doctor-patient relationship with the exposed person, or in the case of a board-certified pathologist, has examined tissue samples or pathological slides of the exposed person at the request of the treating physician….'Id. § 60-4901(o)(2). The plaintiff must prove these requirements by submitting a written report with supporting test results within sixty days of filing suit. Id. § 60-4903(a). If the plaintiff fails to make this showing, then the Court must dismiss the case without prejudice. Id. § 60-4903(c)." The court dismissed the case against Hennessy, finding no evidence that the plaintiff's expert pathologist, Dr. James Strauchen, had any kind of doctor-patient relationship with Mr. New.

Defendant Caterpillar, however, fared differently. The court denied its motion to apply Kansas law, holding that "Missouri boasts the most significant relationship to Plaintiffs' claims against Caterpillar." The court gave Caterpillar additional time to submit a supplemental brief on the choice of law argument and went on to withhold a ruling on Caterpillar's causation arguments until after the Daubert challenge to Dr. Strauchen is resolved.

Read the first decision here. | Read the second decision here.

Other Summary Judgement Decisions:

- **Bankruptcy**
    - **Two Rulings From MDL Allow Previously Dismissed Asbestos Claims to Proceed Against Various Ship Owners Despite Previous Dismissed Actions Not Listed as Assets in Bankruptcy**
      (U.S. District Court for the Eastern District of Pennsylvania, January 25, 2016)
- **Bare Metal**
    - **Federal Court Outlines Alternative Standard to Bare Metal Defense**
      (U.S. District Court for the Eastern District of Louisiana, October 4, 2016)

- **Various Manufacturers Granted Summary Judgment Under Mississippi Law, Including Acceptance of Bare Metal Defense**
  (U.S. District Court for the District of Delaware, July 13, 2016)

- **Lack of Evidence of Asbestos Replacement Parts Supplied by Crane for Use in Crane Valves Key to Granting of Summary Judgment**
  (U.S. Court of Appeals for the Eleventh Circuit, May 27, 2016)

- **Valve Manufacturer Granted Summary Judgment Under Maritime Law Where it May Have Recommended, But Did Not Provide, Asbestos-Containing Flange Gaskets**
  (U.S. District Court for the District of South Carolina, Charleston Division, January 27, 2016)

Expert Challenges

- **Appellate Court Allows Industrial Hygienist's Reliance on Hearsay Evidence in Overturning Summary Judgment in Favor of Defendant Lumber Company**
  (Court of Appeal of California, First Appellate District, Division One, July 27, 2016)

- **Preclusion of Plaintiff's Causation Expert Upheld on Appeal Due to Failure to Consider Decedent's Smoking History**
  (Court of Appeal of Louisiana, Fourth Circuit, June 22, 2016)

- **Plaintiff's Expert Testimony Precluded and Summary Judgment Granted Where Expert Opinion Did Not Rely Upon Sufficient Facts or Data**
  (U.S. District Court for the District of Maryland, June 6, 2016)

- **Plaintiff's Expert's Testimony Precluded and Summary Judgment Granted Where Expert Disclosure Was Untimely, the Expert Opinion Lacked Sufficient Factual Basis, and Plaintiff's Claims Were Legally Insufficient on Causation**
  (U.S. District Court for the District of Maryland, May 18, 2016)
- **Regardless of Whether New York or Maritime Law Applied, Government Contractor and Bare Metal Defenses Insufficient to Grant Summary Judgment to Foster Wheeler**
  (U.S. District Court for the Northern District of New York, March 21, 2016)

- **Expert Opinion on Asbestos Content of Insulation — Based in Part on Non-Party Witness Declaration — Sufficient to Create Question of Fact to Overcome Summary Judgment**
  (Court of Appeal of California, First Appellate District, Division One, February 18, 2016)

Federal Officer Jurisdiction

- **Fourth Circuit Upholds Summary Judgment on Substantial Factor Causation and Affirms Denial of Remand Based on Federal Officer Jurisdiction**
  (U.S. Court of Appeals for the Fourth Circuit, May 6, 2016)

Maritime

- **Court Grants Summary Judgment for Defendant Boiler Manufacturer Based on Lack of Causation Under Maritime Law**
  (U.S. District Court for the District of Delaware, September 16, 2016)

- **Court Grants Summary Judgment After Plaintiff Fails to Establish Elements to Pierce the Corporate Veil**
  (U.S. District Court for the Southern District of New York, August 23, 2016)

- **Maritime Law Applied in Granting of Summary Judgment to Manufacturer of Blowers Used on Naval Ship**
  (U.S. District Court for the District of Delaware, August 29, 2016)

- **Magistrate Judge Recommends Various Rulings on Five Summary Judgment Motions Filed by Defendants**
  (U.S. District Court for the District of Delaware, August 19, 2016)

- **Summary Judgment to Shipbuilders Upheld on Appeal Since Ships Are Not Products and Rejection of Plaintiffs' Every Exposure Claim**
  (U.S. Court of Appeals for the Ninth Circuit, March 31, 2016)

- **On Remand, Federal Court Again Grants Summary Judgment on Plaintiff's Maritime and State Law Claims**
  (U.S. District Court for the Central District of California, February 8, 2016)
- **Valve Manufacturer Granted Summary Judgment under Maritime Law Based on Lack of Causation**
  (U.S. District Court for the Southern District of Illinois, January 5, 2016)

Statute of Limitations

- **Plaintiff's Claims Barred on Statute of Limitations Based on When She Learned of Her Injuries**
  (U.S. District Court for the Eastern District of Texas, Sherman Division, August 31, 2016)

Statute of Repose

- **Court Affirms Summary Judgment in Part Regarding Turbines But Reverses in Part as to Switchgears by Same Manufacturer**
  (U.S. Court of Appeals for the Third Circuit, September 13, 2016)

- **Insulation Found to be Integral to Turbine as Court Grants Renewed Motion for Summary Judgment Based on Statute of Repose**
  (U.S. District Court for the Northern District of Illinois, Eastern Division, July 21, 2016)

- **Boiler Manufacturers Obtain Summary Judgment Based on Statute of Repose**
  (Circuit Court for Baltimore City, Maryland, May 27, 2016)

- **Work Performed by Insulation Contractor was Maintenance, Not Improvement, to Real Property; Wisconsin Statue of Repose Did Not Bar Asbestos Claims**
  (U.S. District Court for the Eastern District of Wisconsin, January 6, 2016)

Verdict Reduction Decisions

Court Affirms Judgment for Defendant Carnival Cruise Line That Set Aside a $3.6M Verdict

(Circuit Court of the 11th Judicial Circuit, Miami-Dad County, Florida, October 19, 2016)

On October 19, 2016, the Third District Court of Appeal, State of Florida, affirmed a final judgment in favor of defendant Carnival Corporation, finding no merit.

In the original case at bar, the plaintiff, Giovanna Settimi Caraffa, individually and as personal representative of the estate of Benedetto Emanuele Caraffa, deceased, filed suit in the Circuit Court of the 11th Judicial Circuit in and For Miami-Dade County, Florida, alleged among other things, that the decedent was injured as a result of asbestos exposure while working and living on board Carnival vessels. This case went to trial and a verdict was issued on December 17, 2014 pursuant to the following determinations by the jury: (1) Carnival was a legal cause of loss, injury or damage; (2) there was unseaworthiness on the part of one or more of Carnival's vessels which was the legal cause of loss, injury or damage; (3) there was negligence on the part of Mr. Caraffa which was the legal cause of his loss, injury or damage; and (4) the percentage of negligence was allocated to 35 percent for Carnival and 65 percent to the plaintiff.
The jury awarded total damages in the amount of $10,339,054 which was broken down as follows: (i) Pre-Death Damages included $128,000 for damages for net lost earnings and benefits through the date of death and $10,000,000 in damages for pain and suffering, disability, physical impairment, mental anguish, inconvenience, aggravation of a disease, and loss of capacity for the enjoyment of life through the date of his death, and (ii) Post-Death Damages included $19,054 in damages to the estate for funeral expenses resulting from decedent's death and $192,000 in damages sustained by decedent's wife, as Personal Representative of the Estate for the loss of decedent's support resulting from his death. Pursuant to Florida law, as Carnival Corporation was found to be 35 percent liable, they were responsible for 35 percent of the verdict, or approximately $3.6M.

Post-verdict, defendant Carnival Corporation filed a motion to set aside the verdict and enter judgment in accordance with its prior motion for a directed verdict alleging the plaintiff has not established sufficient evidence to demonstrate that on Carnival Cruise Line ships, the decedent was exposed at all to friable asbestos. On February 9, 2015, the Circuit Court granted the defendant's motion and held "there was evidence that could have been, that might have been, but . . . it is this Court's belief that such evidence is not sufficient." On appeal, the Third District Court of Appeal of the State of Florida affirmed this defense judgment finding the plaintiff had no merit. Therefore, the $3.6M verdict against Carnival was set aside.

Read the full decision here. | Read the notice of appeal here.| Read the verdict sheet here.

Pennsylvania Federal Court Denies Defendant's Motion to Mold Verdict and Grants Plaintiff's Motion to Apply Delay Damages to Compensatory Damages

(U.S. District Court for the Eastern District of Pennsylvania, June 15, 2016)

The plaintiff-decedent, Valent Rabovsky, and his wife Ann Rabovsky filed suit in the Philadelphia County Court of Common Pleas, claiming that the plaintiff-decedent, who had worked as a millwright in the 1950s, developed malignant mesothelioma from work-related exposure to asbestos and asbestos containing products, which were produced, manufactured, and/or distributed by various defendants (Case was removed to Federal Court three months later).

On February 2, 2016, a jury trial was held on the issue of whether defendant Crane Co. was negligent in failing to warn the plaintiffs of the danger of exposure to asbestos. The jury found in favor of the plaintiffs and awarded $1,085,000 in damages, consisting of $835,000 in compensatory damages and $250,000 for Ann Rabovsky for loss of consortium. The jury apportioned liability against defendant Crane Co. and the settling defendants as follows:

Joint Tortfeasor Defendant	**Apportioned Liability**
Crane Co.	30%
CBS Corporation	25%
Foster Wheeler Energy Corp.	20%
Goulds Pumps, Inc.	13%
Doe Run Resources Corp.	5%
Duquesne Light Company	5%
Honeywell International	2%
AK Steel Corporation	0%
Beazer East, Inc.	0%
IMO Industries Inc.	0%
Ingersoll-Rand	0%
Pennsylvania Electric Company	0%

United States Steel Corporation	0%
TOTAL	100%

After the trial, both Crane and the plaintiffs filed post-trial motions to mold the verdict and/or delay damages. Crane Co. filed a motion to mold the verdict and award, contending that the plaintiffs have already been made whole through compensation with the settling defendants prior to trial, and by present/future claims filed with asbestos bankruptcy trusts. Therefore, the defendant argues, the plaintiffs are not entitled to further monetary award since the doctrine of joint and several liability does not support the plaintiff's recovery of more than one satisfaction for one injury. Additionally, Crane argues that, the proposition that a non-settling tort-feasor remains liable for his full proportionate share of the damage award regardless of the amount paid by a settling defendant, is inapplicable because the plaintiffs suffered no shortfall.

The plaintiffs filed a motion to mold the verdict and for delay damages, requesting that final judgment against Crane Co. be entered and the total verdict amount of $1,085,000 be molded to $325,500 to reflect the 30 percent amount of liability apportioned Crane Co. and to that amount, apply delay damages. In support of these requests, the plaintiffs argue that: (1) The defendant Crane Co. is jointly and severally liable for the plaintiffs' damages; (2) Crane Co. is entitled to a set-off for any settlement amount agreed to with a settling defendant who the jury found was a joint tortfeasor; and (3) the verdict against Crane Co. cannot be less than the 30 percent share of liability apportioned to Crane Co. The plaintiffs further contend that there is no justification for any credit that would lower the judgment against Crane Co. below the jury's verdict for Crane Co.'s apportioned liability which was amounted to $325,500.

In its decision to mold the verdict, the court noted a verdict is reduced only by the allocated proportionate share of the settling tortfeasor. In other words, the non-settling tortfeasor may not enjoy a set-off which would reduce or lower its out-of-pocket expense below its own allocated share of the liability. The fact that the plaintiff may receive a larger amount in damages than that determined by the jury does not militate against such an approach. This practice of holding the non-settling tortfeasor liable for his full proportionate share advances the policy in favor of settlement. In the current matter, the Court emphasized that Crane Co. failed to offer any information or evidence to support this claim and merely speculated that the total consideration paid by the settling defendants plus the amount received as a result compensation received or to be received from asbestos bankruptcy trusts exceeds the jury's verdict of $1,085,000. Therefore, because the jury, after weighing the evidence, allocated liability amongst seven defendants whom it determined to be joint tortfeasors, Crane Co. is only entitled to a reduction of the total jury verdict based on the determination of Crane's liability. In other words, the court denied Crane Co.'s motion and held Crane Co. is liable for its full 30 percent share of the verdict.

In its review of the plaintiffs motion for delay damages, the court outlined the Pennsylvania Rule of Civil Procedure provides for delay damages for bodily injury, death or property damages only, and (1) shall be awarded for the period of time from a date one year after the date original process was first served in the action up to the date of the award, verdict or decision, and (2) shall be calculated at the rate equal to the prime rate as listed in the first edition of the *Wall Street Journal* published for each calendar year for which the damages are awarded, plus one percent, not compounded. Therefore, the court used this formula to apply delay damages pursuant to the compensatory damages only. The loss of consortium damages of $250,000 were not considered in this calculation. Delay damages were applied for the years 2011 through 2016 using the following calculation: $250,000 (30 percent of $835,000 Compensatory Damages) X (Interest Rate) X (Numbers of days delay damages rewardable). After totaling each year, the plaintiffs were entitled to $51,596.73 in delay damages. This amount, added to Crane Co.'s 30 percent apportioned liability amount of $325,500, results in a total molded verdict against Crane Co. in the amount of $377,096.73

Read the full decision here.

New York Judge Vacates Award of Past and Future Pain and Suffering to Plaintiff Against Brake Grinder Manufacturer and Orders New Trial on Damages Unless Plaintiff Stipulates to Reduced Awards

(Supreme Court, New York County, April 25, 2016)

The plaintiff, Walter Miller, filed suit against a number of defendants alleging that his mesothelioma was caused by exposure to asbestos through his use of a brake grinding machine manufactured by Ammco. At trial, the jury rendered a verdict in favor of the plaintiff and against the sole defendant remaining at trial, Hennessy Industries, Inc. (Ammco), in the amount of $25 million, consisting of $10 million for past pain and suffering and $15 million for future pain and suffering. A summary of that verdict can be found here. Ammco filed post-trial motions seeking entry of judgment notwithstanding the verdict, a new trial, or in the alternative, remittitur of damages.

Ammco made a number of arguments as to why the verdict should be set aside, arguing that: 1) it did not owe the plaintiff a legal duty to warn about the dangers of asbestos in automobile brakes, which was a product that it did not manufacture; 2) the evidence offered at trial was insufficient to establish general or specific causation under New York law; 3) an improper comment by the plaintiff's counsel during opening statement warranted a mistrial; 4) it was entitled to a directed verdict on the plaintiff's claim that it acted in reckless disregard of the safety of others and the court's instruction on recklessness did not comport with the law; 5) the jury's allocation of fault was against the weight of the evidence; and 6) the evidence offered at trial was insufficient to support the jury's finding that the plaintiff used an Ammco grinder and that Ammco failed to exercise reasonable care by marketing its grinders without an adequate warning. In the alternative it argued that it was entitled to a new trial or remittitur because the jury's award of damages was excessive. The court rejected all of these arguments except as to the amount of the award of damages. Of note, the court rejected the argument that there is no duty to warn as a matter of law and said that was an issue for appeal and rejected the argument that there was sufficient evidence to support general and specific causation.

As to the jury's award of damages, the court agreed that the award of damages to the plaintiff of $10 million for past pain and suffering and $15 million for one year of future pain and suffering was excessive. The court applied the standard of whether the award deviates materially from what would be reasonable compensation by comparing the instant case with analogous cases with awards that have previously been upheld. The court determined that "based on all the circumstances of the plaintiff's injuries, the award of $10 million for past pain and suffering and $15 million for one year of future pain and suffering deviates materially from what would be reasonable compensation." The court ordered the award for past and future pain and suffering vacated and a new trial was ordered on the issue of damages for past and future pain and suffering unless the plaintiff stipulates to reduce the award of damages for past pain and suffering to $5 million and future pain and suffering to $4 million.

Read the full decision here.

Other Verdict Reduction Decisions:

- **Bankruptcy**
  - **Appellate Court Grants New Trial Due to Lower Court's Error on Jury Charge as to "Recklessness Standard"**
    (Supreme Court of New York, Appellate Division, Fourth Department, July 8, 2016)
- **Damages**
  - **Court Issues Significant Verdict Reduction Based in Part on Jury Error of Finding Intentional Misrepresentation and Fraudulent Concealment**
    (Superior Court of California, Los Angeles County, July 18, 2016)