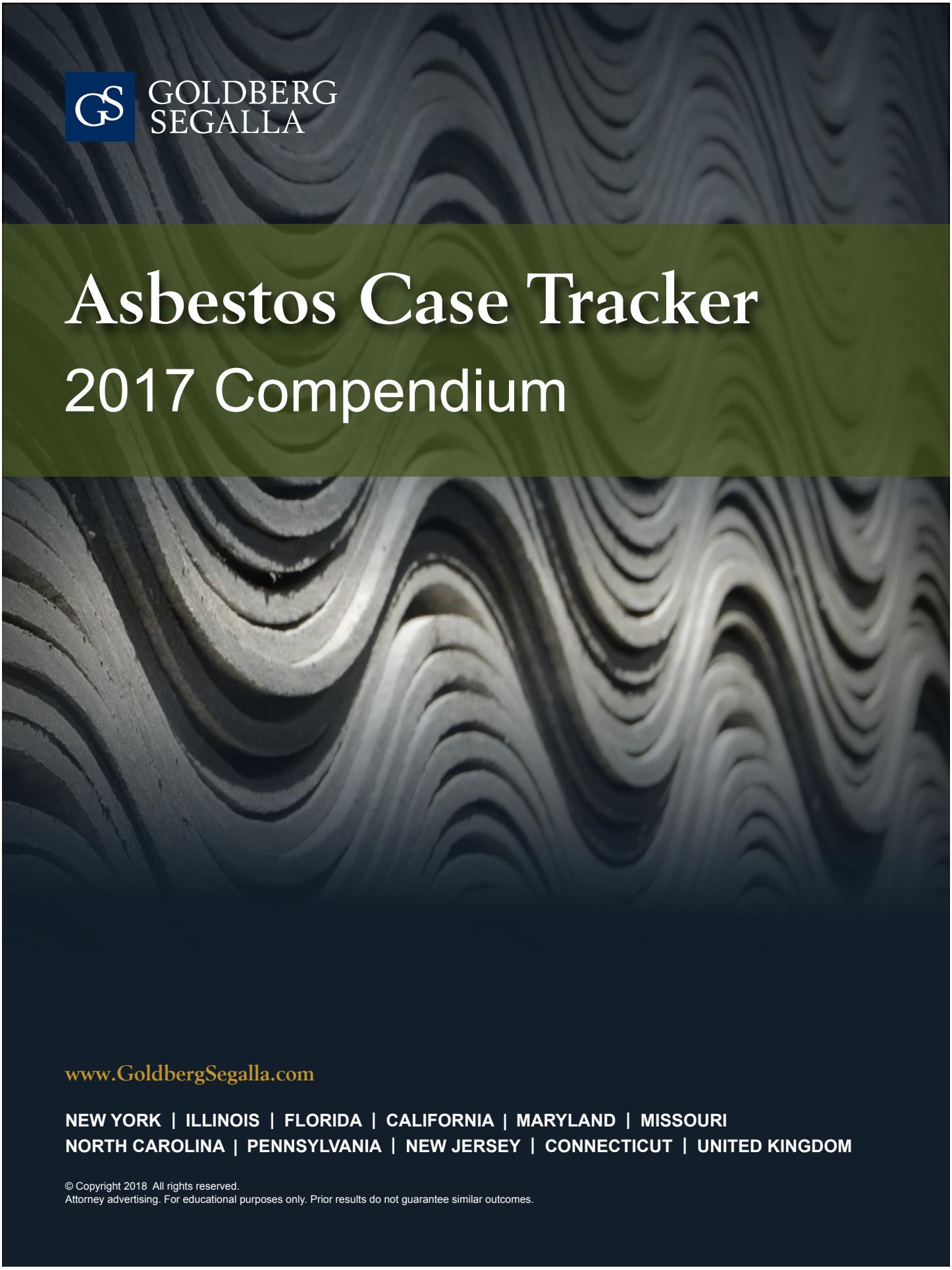

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Bankruptcy Decisions

Channeling Injunction Prohibits General Motor's Wrongful Death Suit for Contribution against the Manville Trust

(U.S. Bankruptcy Court, Southern District of New York, July 24, 2017)

General Motors (GM) filed suit against the Manville Personal Injury Settlement Trust (Manville) seeking a declaratory order that its state suit against Manville was not barred by the longstanding "Channeling Injunction" of the Manville Corporation's chapter 11 reorganization (the Plan) and subsequent order confirming the same.

Separate from the declaratory complaint, GM filed suit in Ohio state court against the estate of Bobby Bolen and multiple asbestos defendants including Manville. GM alleged the defendants were jointly and severally liable to GM as it had subrogated to the rights of Mr. Bolen for payments previously made to Bolen under a worker's compensation claim. GM further asserted that it was entitled to the full amount of its interest due "from defendants' and Bolen's failure to give notice to GM of the settlements" they had reached while GM was paying monthly payments to Bolen.

Manville moved to dismiss the declaratory complaint on practical grounds and argued that the Trust Distribution Procedures of 1995 barred the plaintiff's state court action against Manville filed in Ohio. The court gave a lengthy analysis of the history of the Johns Manville bankruptcy, which culminated with the creation of two separate bankruptcy trusts. The plan was set to provide a sole avenue to pay claims to asbestos claimants rather than discharging all claims through bankruptcy. The court first noted that the plan explicitly reserved jurisdiction for interpretation of disputes regarding the trust. Here, the Trust argued its position was supported by a prior case, Graphic, decided last year where Graphic had sued for declaratory relief. In that case, the court enjoined asbestos plaintiffs' claims based on the channeling injunction. The court agreed that the Graphic case was identical to the one before it. GM was correct to seek equity in this Court and stated that "failure to first obtain a ruling from this Court that the injunction does not apply would result in a violation of the injunction, potentially subjecting the offending party to sanctions." GM argued that Ohio Code requiring Mr. Bolen to "notify a statutory subrogee and the attorney general of the identity of all third parties against whom the claimant has or may have a right of recovery…" was not met by Mr. Bolen. However, the court pointed out that the provisions of the trust set specific parameters for filing a claim against it. Specifically, the confirmation states that suits against Manville "for the purpose of, directly or indirectly, collecting, recovering or receiving payment of, on or with respect to any Claim, interest of Other Asbestos Obligation" is prohibited. Accordingly, GM cannot sue Manville in state court because of these provisions regardless of whether GM is a subrogee or if it sues on its own. Here, the court concluded that Bolen's claim would have fallen into the "Other Asbestos Obligation." Moreover, Ohio Code and the Confirmation Order do not provide for GM's alleged subrogation against Manville according to the court.

Notably, the court pointed out that the purpose of the channeling injunction was to prohibit all suits arising from asbestos litigation. Without it, there would be no litigation because the claims would have been discharged in the bankruptcy. The court continued and stated that GM was in fact asserting a claim for contribution rather than one for subrogation because it was "not standing in Bolen's shoes." On the contrary, GM was trying to recover against both Manville and Bolen for his failure to notify GM of the settlement with the trust.

Consequently, GM cannot sue Manville in the state action.

Read the full decision here.

Summary Judgment Affirmed in Favor of Successor Premises Owner Where Bankruptcy Code Extinguished Claims

(Superior Court of Pennsylvania, January 26, 2017)

Jacqueline and Thomas Wagner filed suit against Standard Steel LLC for Ms. Wagner's alleged development of mesothelioma as a result of take home exposure from the work clothes of her husband. Mr. Wagner worked as a laborer and crane operator at Freedom Forge from 1970-72. Freedom Forge filed for Chapter 11 protection in 2001. Appellee Standard Steel LLC purchased the sale of Freedom Forge's assets in 2002. The bankruptcy court confirmed the sale and found: 1) the sale price was fair and reasonable at an arm's length transaction, 2) The sale agreement and transactions were done in good faith without collusion, 3) Except for assumed liabilities expressly outlined in the sale, the assets purchase was effectuated "free and clear" of all interests and claims, 4) "A sale of the purchased assets other than one free and clear of all claims or interests would materially and adversely impact Debtor's estates,

and yield substantially less value for the…, estates with less certainty than the available alternatives," 5) Sufficient due notice of the sale confirmation hearing was provided in accordance with the Code and all Bankruptcy Rules.

Appellants argued that liability for claims that had not yet arisen at the time of the sale were not barred by bankruptcy code. The court started with the standard for summary judgment and stated that summary judgment is appropriate when there is no dispute as to any material fact. Relying on Section 363 (f) of the Code and its decision in *In re Trans World Airlines, Inc.*, the court affirmed summary judgment. Specifically, the court found that the Code permits a sale of the "interest in property" and that although not expressly defined by Congress, "the phrase should be broadly read" to permit a bankruptcy court to bar potential liability that could follow the property. The appellants contended that *Matter of Frenville Co., Inc.* applied and that claims that had not yet arisen were not barred. The court in *Frenville* allowed suit after bankruptcy protection had been sought. However, the court stated that *Frenville* stood for a "discharge of legal claims against a debtor, not successor liability following an asset purchase sale." Additionally, the court discussed the *Grossman* case where *Frenville* was overruled. In *Grossman*, the claim was filed after the injury manifested, which was years after the reorganization. The appellants attempted to argue that Ms. Wagner's injury also manifested after the reorganization of Freedom Forge. The court was not persuaded and stated the Appellant was not a debtor and "Appellant was not exposed to Appellee's product or conduct." The court refused to apply the *Frenville* line of cases under those circumstances. Therefore, summary judgment was affirmed.

Read the full decision here.

Bare Metal/Component Parts Decisions

Pennsylvania Supreme Court to Consider Manufacturer's Liability for Asbestos-Containing Component Parts

(Supreme Court of Pennsylvania, October 26, 2017)

The United States Court of Appeals for the Third Circuit submitted a Petition for Certification of Question Law on the following issues for consideration: (1) Whether, under Pennsylvania law, a manufacturer as a duty to warn about the hazards of asbestos relating to component parts it has neither manufactured or supplied and (2) if such a duty exists, what is the appropriate legal test to determine liability.

On October 26, 2017, the Pennsylvania Supreme Court agreed to consider these issues and instructed parties to submit briefs and prepare for oral argument. This appeal stems the *Rabovsky* decision, which was subject to a prior ACT post on September 28, 2016. Here, the U.S. District Court for the Eastern District of Pennsylvania rejected defendant's argument that a manufacturer cannot be held liable for asbestos-containing component parts.

ACT will continue to monitor this issue and provide an update accordingly.

Read the full order here.

Standard Based Approach in Bare Metal Defense Permits Sailors to Recover in Negligence

(U.S. Court of Appeals, Third Circuit, October 3, 2017)

The plaintiffs filed suit in negligence and strict liability against several defendants arguing their decedents died from mesotheliomas as a result of their exposure to asbestos containing products for which defendants were responsible. Both plaintiffs alleged exposure while working on-board naval vessels. The defendants removed the case to federal court and summary judgment was granted in their favor on the bare metal defense. The plaintiff separately appealed on the issues of negligence. The appeal was remanded to sort out the negligence issue against the backdrop of the split in authority regarding the bare metal defense. The court applied the bright line rule finding that the bare metal defense applied to both strict liability and negligence. The appellate court then consolidated both cases on yet another round of appeals.

The court's analysis began with an acknowledgment of the split that exists concerning the bare metal defense. The bright line rule found in *Lindstrom* states that a manufacturer is not liable for injuries when asbestos is later added to the defendant's bare metal products. The other rule found in *Quirin*, holds the same manufacturer liable when the facts illustrate that the injury was reasonably foreseeable in light of the manufacturer's conduct. The court determined that both approaches may be correct as duty and cause are founded within the defense. As the appellants had waived their argument on strict liability, the court was only concerned with the bare metal defense with respect to the appellants' negligence claims. Focusing the defense on foreseeability alone does not close the issue according to the court. The court's discussion then turned on the differences between rules and standards concluding that there are tradeoffs on which rule is applied. According to the court, maritime law's purpose is to protect sailors from the perilous nature of their duties. Therefore, a standard like approach to the bare metal defense is more appropriate. Accordingly the court found that "a manufacturer of a bare metal product may be held liable for a plaintiff's injuries suffered from later added asbestos containing materials if the facts show the plaintiff's injuries were a reasonably foreseeable result of the manufacturer's failure to provide a reasonable and adequate warning." The court noted this standard should be applied at least for negligence claims but did not address the issue as to strict liability.

Read the full decision here.

Various Defendants Granted Summary Judgment Under Maritime Law Bare Metal Defense

(U.S. District Court for the District of Delaware, August 31, 2017)

Plaintiffs Stephen and Marilyn Charlevoix filed this asbestos related personal injury action in Delaware Superior Court against multiple defendants on July 10, 2015. Crane removed the action to this court on August 21, 2015. The plaintiff stated that Mr. Charlevoix was first exposed to asbestos-containing products during his service as a boiler tender with the U.S. Navy from 1961 to 1964 aboard the USS Valley Forge. After his service in the Navy, Mr. Charlevoix worked at Grede Foundry from 1964 to 1966 as a grinder. From 1966 to 1978, Mr. Charlevoix worked as an equipment operator and foreman for M.J. Electric. After leaving M.J. Electric, Mr. Charlevoix went to Charlevoix Logging to work as a logger, where he worked until 2012. The plaintiff and two other product identification witnesses were deposed. Five defendants filed motions for summary judgment. The motions were filed by the defendants, Caterpillar Inc., VIAD Corp., Warren Pumps, LLC, Crane Co., and Ford Motor Company. "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Material facts are those that could affect the outcome of the proceeding, and "a dispute about a material fact is 'genuine' if the evidence is sufficient to permit a reasonable jury to return a verdict for the nonmoving party."

The parties agree that maritime law applies to all naval and sea-based claims. In order to establish causation in an asbestos claim under maritime law, a plaintiff must show, for each defendant, that "(1) he was exposed to the defendant's product, and (2) the product was a substantial factor4 in causing the injury he suffered." Other courts in this Circuit recognize a third element and require a plaintiff to "show that (3) the defendant manufactured or distributed the asbestos-containing product to which exposure is alleged."

Further, should the court decide that product identification has been established, it then considers the assertion of the "bare metal" defense by the moving defendants. The bare metal defense relates to defendants in asbestos cases that "manufactured so-called 'bare-metal' products that contained or were later encapsulated in asbestos."

After analysis of the testimony of the witnesses the court found that the witnesses' testimony did not carry the plaintiffs' burden to overcome summary judgment. As such, all defendants' motions were granted.

Read the full decision here.

Summary Judgment Recommended for Naval Boiler Manufacturer on Issues of Product Identification and Bare Metal Defense (Maritime/Remand)

(U.S. District Court for the District of Delaware, August 21, 2017)

The plaintiff filed suit alleging Mr. Tallman developed mesothelioma while serving in the U.S. Navy from 1947-67. Foster Wheeler removed the case to the United States District Court.

Mr. Tallman served on board the USS Caloosahatchee as a boiler tender from 1948-56. Specifically, the plaintiff contended that Mr. Tallman's mesothelioma developed as a result of exposure to asbestos for which Foster Wheeler was responsible. Two fact witnesses were offered for deposition. Mr. Nealon testified that he served on board the USS Caloosahatchee from 1951-54. He recalled Mr. Tallman making asbestos insulation that went around steam valves. However, Mr. Nealon was unable to recall the name or brand of the boilers he and the plaintiff cleaned. The second fact witness, Mr. Schaufele, testified that he did not recall repair or maintenance work with Mr. Tallman but then stated he recalled Mr. Tallman cleaning out boilers made by Foster Wheeler. The plaintiff argued that Mr. Tallman was exposed to asbestos insulation from the linings of the Foster Wheeler boilers.

The court started its discussion with an overview of the standard for summary judgment. Summary judgment is appropriate if the movant shows that there is no genuine dispute as to any material fact. Here, the parties agreed that maritime law applied. For causation, the standard requires the plaintiff to show that he "was exposed to the defendants product and that the product was a substantial factor in causing the injury he suffered." The court quickly recommended granting summary judgment. As for the fact witnesses, the court found that neither Mr. Nealon nor Mr. Schaufele's testimony established exposure to asbestos from a Foster Wheeler product. For example, nothing in the record stated that the valves the plaintiff may have packed were made by any particular defendant let alone Foster Wheeler. Moreover, neither witness confirmed exposure from the cleaning of the interior of the boilers. Although the testimony confirmed the presence of Foster Wheeler boilers there was nothing to rise to the level of substantial factor in the light most favorable to the plaintiff.

The plaintiff argued that under the *Qurin* case Foster Wheeler is liable for exposure to its product including replacement parts and therefore the bare metal defense was not applicable. In support, the plaintiff submitted Foster Wheeler technical manuals illustrating the use of asbestos parts. However, the court was not persuaded as the submission did not establish any relation to the USS Caloosahatchee. As the court has previously declined to follow *Qurin*, it declined to do so here and found the bare metal defense applicable.

Foster Wheeler also argued it was entitled to the government contractor defense. The defense shields against liability in a failure to warn case for a federal contractor when 1) the federal government approved reasonably precise specifications, 2) the equipment conformed to those specifications, and 3) the supplier warned the federal government about the dangers in the use of the equipment that were known to the supplier but not the federal government. Here, Foster Wheeler submitted evidence that the government was involved in "the design and manufacture of all products" on its warships. Additionally, evidence suggested that the navy would not permit suppliers like Foster Wheeler from labeling any equipment with warnings. The plaintiff countered with its own evidence from Captain Arnold Moore which illustrated the navy's demand for information on hazards associated with products supplied by others. A question of fact was thus presented according to the court. However, Foster Wheeler was entitled to summary judgment on causation and maritime law as discussed above. The court also denied the plaintiff's demand for punitive damages and entered summary judgment in favor of Foster Wheeler.

Read the full decision here.

Bare Metal Defense Rebuts Plaintiffs' Causation Argument for Majority of Industrial Equipment Manufacturers

(U.S. District Court for the Western District of Wisconsin, April 12, 2017)

Patricia Carroll, as special administrator of Ronald Carroll's estate, sued numerous manufacturers of industrial equipment in which asbestos replacement parts were used, manufacturers of asbestos, or both in U.S. District Court for the Western District of Wisconsin. The claims against the defendants arise from the time Mr. Carroll spent working at Wisconsin Power & Light (WP&L) from 1959 to 1974. Mr. Carroll worked in a variety of different jobs WP&L's plants during that period of time, including plant helper, auxiliary equipment operator, and boiler operator.
The majority of the plaintiffs' facts derive from deposition testimony of three of the decedent's coworkers. The testimony of the coworkers alleged that all of the valves that were worked on were made of asbestos, regardless of their size. They also testified that the decedent used rope packing for valves. One coworker testified that the decedent would have replaced hundreds of gaskets over his career at WP&L. Lastly, all of the coworkers testified that the conditions in the plants were dusty.

All of the remaining defendants moved for summary judgment as to all of the plaintiff's product liability claims. The defendants' motions generally present similar arguments regarding the plaintiff's causation evidence and assert the "bare metal defense." The bare metal defense provides that "a manufacturer is not liable for harm caused by, and owes no duty to warn of the hazards inherent in, asbestos products that the manufacturer did not manufacture or distribute. To determine whether a plaintiff has sufficient evidence to prove causation at summary judgment, the court

must evaluate "whether the defendant's negligence was a substantial factor in contributing to the result." Moreover, regarding asbestos-related litigation in particular, Wisconsin courts have declined to adopt bright-line causation tests, choosing instead to weigh whether a defendant's product was a substantial factor causing injury "based on the totality of the circumstances surrounding the work . . . and the products . . . generally used." (Citation omitted).

The court handled the defendants in three groups. First, the court granted summary judgment for defendants Crosby Valve LLC, Atwood & Morrill Co., Inc. and ABB, Inc. because there are no facts from which a reasonable jury could find these defendants liable for manufacturing a defective product or failing to warn about the dangers of asbestos. The plaintiff produced no evidence that these defendants supplied original asbestos components that caused the decedent's injury (such as what actual equipment was installed at the WP&L facilities and when), nor that defendants specified asbestos replacement parts.

Next, while the plaintiff offered evidence that at least some of the valves or pumps Flowserve US Inc., Crane Co. and Ingersoll Rand Company sold during the time period that Carroll worked at WP&L actually contained original asbestos gaskets and packing, and at least some of these defendants' maintenance manuals specified asbestos packing to be used as replacement components, the plaintiffs have failed to offer sufficient evidence that the products of these defendants were substantial factors contributing to Carroll's injury. As a result those three defendants are also entitled to judgment as a matter of law.

Lastly, the court discussed defendants A.W. Chesterton Company and John Crane Inc. The undisputed facts show that these defendants sold gaskets and packing containing asbestos during the time that the decedent worked at WP&L. Unlike the other defendants, the plaintiff also offers at least some evidence that those manufacturers' asbestos products were used in the facilities at which Carroll worked. All three of the decedent's coworkers testified that they worked with John Crane gaskets. Only one of the decedent's coworkers remembered "probably" working with A.W. Chesterton's products. There were no other facts on the records regarding A.W. Chesterton products. As a result of the testimony, the court granted A.W. Chesterton's motion for summary and denied John Crane's motion.

Read the full decision here.

Summary Judgment Recommended for Turbine and Valve Defendants in Mesothelioma Case

(U.S. District Court for the District of Delaware, March 30, 2017)

The plaintiff's executrix brought this claim against multiple defendants alleging that her decedent, Mr. Denbow, developed mesothelioma as a result of his work in the U.S. Navy onboard the USS New Jersey from 1954-57 and while working at Koppers Chemical from 1965-70.

The plaintiff relied upon the testimony of product identification witness Charles Ricker. Although not sure when he met Mr. Denbow, he testified that he met him while working as a machinist mate in engine room Nos. 2 and 4 during his stint on the New Jersey. The testimony also included that repairs would have been made to the Westinghouse turbine including the removal of insulation. Mr. Ricker believed the insulation contained asbestos but he was not sure who made any of the replacement parts including the valves or its packing glands.

Westinghouse and Crane Co. moved for summary judgment. The court began its analysis with the standard for summary judgment. Summary judgment is appropriate when there is no genuine dispute as to material fact. The moving party bears the burden. The existence of some evidence in support of the nonmoving party may not be sufficient to deny a motion for summary judgment, i.e., there must be enough evidence to enable a reasonable finding for the nonmoving party. The parties agreed that maritime law applied. The court noted that the next step beyond deciding product identification would be to apply the bare metal defense. Essentially, the defense "protects a defendant from liability on the basis that no duty to warn exists relating to asbestos containing products the defendant did not manufacture or distribute, absent evidence that defendant did in fact manufacture or supply the asbestos containing product to which the plaintiff was exposed."

Westinghouse: The court recommended the granting of Westinghouse's motion for summary judgment. First, the plaintiff's fact witness did not identify the plaintiff as having worked on the Westinghouse turbine. Therefore, the substantial exposure requirement is not met. The plaintiff countered that under the *Quirin* case, the bare metal defense is not applicable because Westinghouse required asbestos containing insulation for its turbines, and furnished a portion of the insulation. The plaintiff utilized deposition testimony from a former employee of Westinghouse who testified that the turbines had to be insulated because they were powered by steam. However, a finding that Westinghouse delivered the turbines to the USS New Jersey without insulation was previously made. In addition, the court stated that as in previous decisions, it does not follow the *Quirin* case.

Crane Co.: The court also recommended granting Crane Co.'s motion for summary judgment. The plaintiff argued that Crane Co.'s valves utilized asbestos packing. However, Mr. Ricker could not recall any specific products Mr. Denbow used. Moreover, he did not recall the plaintiff working on valves. The plaintiff used circumstantial evidence and asserted that drawings of the USS New Jersey illustrated that Crane valves were in the engine room. Further, witness and engineer Arnold Moore stated that "Crane manufactured and provided valves for the main propulsion system aboard the USS New Jersey." Also, Crane Co.'s representative stated that Crane valves used asbestos and had to be replaced over time. The court was not persuaded and stated that 1) only the presence of Crane valves was proved and 2) McClean's testimony did not prove that asbestos containing Crane valves were on this particular ship. Plaintiff again countered arguing that under *Quirin* the bare metal defense should not apply. The Court declined and reiterated that Plaintiff failed to show a material issue of fact with respect to whether Crane manufactured and supplied asbestos containing valves *for the* USS New Jersey.

Read the full decision here.

Exception to Boiler Manufacturer's Bare Metal Defense Found in Denial of Summary Judgment

(U.S. District Court for the District of Rhode Island, March 16, 2017)

James Stevens served as a boiler technician aboard the USS Allagash from July 7, 1951 until October 11, 1952. The boilers on the Allagash were manufactured by Foster Wheeler and included asbestos containing materials in their construction. Foster Wheeler additionally provided additional asbestos containing materials to be used in the boilers. Mr. Stevens was diagnosed with mesothelioma and passed away in 2015.

The plaintiffs brought suit against various defendants, including Foster Wheeler, in the U.S. District Court for the District of Rhode Island, alleging Mr. Stevens' disease was caused by their use of asbestos containing products. Foster Wheeler filed a motion for summary judgment. The magistrate judge recommended that Foster Wheeler's motion be denied. Foster Wheeler filed an objection to the report and recommendation of the magistrate judge. The court will then grant summary judgment, in the underlying motion subject to this appeal, only "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." The reviewing Judge reviews the magistrate judge's report and recommendation de novo.

Foster Wheeler's moved for summary judgment on five grounds: The plaintiff's claims against Foster Wheeler are barred by the government contractor defense, Foster Wheeler is not liable for products it did not manufacture, design, supply, or install, the plaintiff's claims against Foster Wheeler are barred by the "sophisticated user" defense, the plaintiff's claim for punitive damages is barred under maritime law, and the plaintiff's claim for loss of consortium is barred under maritime law.

The court specifically noted that the exception to the "bare metal defense" stating, "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," as applied by the Magistrate Judge, created a triable issue concerning Foster Wheeler's duty to warn. The reviewing judge found that none of Foster Wheeler's arguments warranted summary judgment. As such, the court accepted the magistrate judge's report and recommendation.

Read the full decision here.

Summary Judgment Granted as to Two Defendants and Denied for Several Others in Bare Metal Defense Case

(U.S. District Court for the Eastern District of Louisiana, March 6, 2017)

The plaintiffs brought this action against several defendants for their decedent's alleged development of mesothelioma while working aboard ships as an engine man, machinery repairman, and machinist mate. The defendants moved for summary judgment again after the court announced it would not adopt the Sixth Circuit's version of the bare metal defense. The court concluded that "the bare metal defense should immunize only a narrower range of conduct."

Summary Judgment is appropriate when the court determines that there is no genuine dispute as to material fact. Of course, the burden is on the moving party to identify the basis of the motion. The nonmoving party must then come forward "with specific facts showing that there is a genuine dispute as to material fact." Before beginning its analysis on summary judgment, the court pointed out that the elements to assert the government contractor were not met. As for component part defendants, the court stated the defendants need only point out the absence of evidence supporting the plaintiff's case, i.e., specific evidence was not required. As for the bare metal defense, the "component manufacturer is treated like the manufacturer of the finished product and may be held liable" when the defendant participated in the integration of the bare metal part with the asbestos containing product. Additionally, liability may be found if the bare metal manufacturer supplied its bare component to a "known incompetent." Here, the defendants did not argue that they did not know asbestos was harmful or that insufficient warnings would ultimately be given. Therefore, the only way the defendants could prevail on summary judgment was to 1) prove that they did not substantially participate in the integration of their bare metal part with the asbestos containing finished product and 2) that they did not recommend the use of asbestos in the product.

Regarding York-Here, the plaintiff testified that he did not work on York's compressors but rather claimed exposure from insulation during valve work. The court concluded that a manufacturer is not liable just because the asbestos "ended up on the manufacturer's product." The valves supplied by York came in shredded lead packing and not in asbestos packing. Further, the plaintiff equivocated on the necessity of use of asbestos in York's valves during his deposition. The court concluded the plaintiff had not cited any genuine dispute as to material fact and granted summary judgment in favor of York.

Regarding Foster Wheeler, like York, the plaintiffs failed to put forth evidence that Foster Wheeler condensers came with asbestos from Foster Wheeler. The court took exception with Mr. Bell's testimony in light of the plaintiff's expert who testified that he had "never seen condensers insulated in my line of work." Summary judgment was entered in favor of Foster Wheeler.

The remaining defendants' motions for summary judgment were denied as the court found the plaintiff had established a genuine dispute as to material fact. No in-depth analysis was provided for the remaining defendants.

Read the full decision here.

Madison County Jury Renders Defense Verdict for Brake Grinder Manufacturer

(Madison County, Illinois, Third Judicial Circuit, February 28, 2017)

Plaintiffs Stan and Janet Urban, of West Bloomfield, Michigan, filed a lawsuit in Madison County, Illinois in March 2013. The plaintiffs alleged Mr. Urban developed mesothelioma due to asbestos exposure from using Ammco brake grinders while employed as a high school auto technology teacher. Defendant Hennessy Industries was the last remaining defendant at trial. Ammco is Hennessy's predecessor. The jury disagreed with the plaintiffs' request for $10 million, and rendered a verdict in favor of Hennessy.

The plaintiffs argued that Hennessy had the power to test its products, recall its machines, issue a retrofit or replacement part, and had the power to warn. The plaintiffs also argued Ammco never tested asbestos exposure from grinding brakes for cancer, and only tested it for asbestosis. The plaintiffs accused Hennessy of gross negligence. Counsel criticized defense experts Dr. Dennis Bridge, Dr. Michael Graham, and Mr. Craig Mountz. Hennessy argued that Mr. Urban's exposures using Hennessy's brake grinder amounted to a maximum of 12 total days of grinding in the nine years he worked for Center Line High School, over a 30 year career with brake grinders. Hennessy relied upon the bare metal defense in arguing that the grinder itself did not contain asbestos. Hennessy highlighted inconsistencies in Mr. Urban's testimony, and noted that Mr. Urban likely used the wrong bag for dust collection from the grinder. In closing, counsel argued that "If Mother Theresa was on trial, Mr. Hart (plaintiff's counsel) would find some way to call her grossly negligent."

Nearly every asbestos case that has gone to trial in Madison County in the past decade has ended in a defense verdict.

Valve Manufacturer's Summary Judgment Denied in Failure to Warn Case Despite Bare Metal Defense

(U.S. District Court for the District of South Carolina, Charleston Division, February 13, 2017)

The plaintiffs brought this action against Crane Co. alleging James Chesher developed mesothelioma as a result of exposure to asbestos containing packing and gaskets found inside Crane Co. valves while he served in the United States Navy from 1965-1989.

The court began its discussion by stating the standard for summary judgment. Summary judgment is appropriate when the "pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." It was undisputed that maritime law applied. Prior to applying the law to the facts, the court gave a lengthy analysis on competing state laws regarding the bare metal defense which Crane had asserted in the instant case. In the landmark *Lindstrom* decision, the court stated that the bare metal defense was available because "plaintiffs had not shown that the defendants actually manufactured the asbestos-containing material that caused their injuries." Others cases followed supporting the *Lindstrom* approach like *Conner.* In *Conner*, the court denied the plaintiffs' claims in a failure to warn case citing *Lindstrom*. However, other jurisdictions took the approach found in the *Quirin* case. In *Quirin*, the court refused to apply *Lindstrom* finding that it did not discuss failure to warn cases. Other courts adopted middle of the road theories which analyzed factors including whether the manufacturer incorporated asbestos-containing products into its product and whether it was foreseeable that asbestos-containing products would be used in its products. The court acknowledged that a split had developed between the restrictive *Conner* approach and the *Quirin* style cases with respect to the issue of failure to warn. In *Lindstrom*, the decision was clear as to negligence and strict liability but was ambiguous as to failure to warn cases. Some pro *Lindstrom* courts recognized that a manufacturer's failure to warn could cause a plaintiff to be injured. This troubled the court. Public policy also had influenced the application of *Lindstrom*. The court concluded that *Lindstrom* does not close the door for the *Quirin* application in failure to warn cases. The court honed in on the fact that a defendant cannot argue it lacked control over the "risks associated" with the components since it had was in a position to test the product from the beginning.

The court held that failure to warn cases are not closed by the bare metal defense. Here, the court also held that in a failure to warn case a plaintiff must demonstrate that 1) the defendant actually incorporated asbestos-containing components into its original product 2) the defendant specified the use of asbestos containing replacement components or that such components were essential to the proper functioning of the defendant's product. Here, Crane, by admission, stated that it enclosed "asbestos-containing gaskets, packing or discs" for use in certain valves. Accordingly, there was a reasonable inference that those valves were on the ships with Mr. Chesher. Further, evidence of drawings suggested that Crane specified the use of asbestos in the components. Crane argued that the Navy specified what Crane had to provide. However, Plaintiff's expert testified that the drawings illustrated Crane's specifications. Hence, the material fact in dispute according to the court. Further, Crane argued that plaintiff had not met his burden of substantial factor causation (SFC). The court noted that the SFC argument was not raised until Crane filed its reply to plaintiff's opposition. Secondly, the SFC argument was found by the court to be inadequate because Crane's authority in support had rejected the every exposure theory. The SFC argument did not address the current experts and their opinions with respect to causation. Summary judgment was therefore denied.

Read the full decision here.

Consolidation Decisions

Mesothelioma Case Removed from Extremis Trial Group Where Plaintiff Failed to Identify New York City Defendant

(Supreme Court of New York, New York County, February 2, 2017)

Talc defendants filed an appeal of a recent mesothelioma case arguing that the plaintiff should not have been added to a fast tracked "in extremis" trial group. All defendants in this matter were talc defendants. However, the plaintiff alleged that he was exposed to asbestos from ovens in Queens when he was approximately 8-10 years old. The plaintiff alleged that he accompanied his father to work and would crawl inside the "cooled oven" to retrieve the resistors that were inside since he was the only one small enough to fit inside the oven.
The defendants argued: 1) The plaintiff failed to identify any manufacturer/supplier of the ovens 2) the plaintiff did not prove that the ovens contained asbestos 3) the plaintiff "manufactured" testimony to achieve in extremis status and 4) the plaintiff's expert report opined that his mesothelioma developed as a result of his exposure to talc. The plaintiffs countered and stated that the status of in extremis is maintained by the plaintiff's connection to New York. Further, the plaintiff argued that if his in extremis status was revoked then the defendants should be precluded from testifying that he was exposed to asbestos from ovens. Finally, the plaintiff took the position that their expert reports discussed only talc exposure because of the short deadlines imposed upon them.

The court reviewed its recent decision in the *Trumbull* case and concluded that the in extremis docket was essentially one for terminally ill plaintiffs. The requirement for a connection to New York City is in place to discourage forum shopping. In that decision, the weight of exposure in one jurisdiction versus New York City was irrelevant. Here, the court found the facts to be different than *Trumbull*. After months of investigation, the plaintiff had not "sued or identified any entity alleged to have responsibility for the oven, nor did the plaintiff testify that the oven at issue was labeled as having asbestos content." Consequently, the court granted the defendants' motions and ordered the case removed from the in extremis cluster.

Read the full decision here.

Damages Decisions

Mesothelioma Verdict Reduced by $4.3 Million on Appeal

(Supreme Court, State of New York, November 8, 2017)

Plaintiff Mary Nash filed suit on behalf of the plaintiff's decedent, Lewis Nash, alleging bystander exposure to asbestos-containing dust from defendant Navistar's brakes and gaskets while working as a janitor and bus driver in the Fayettteville-Manluis Central School District. The decedent's exposure occurred in the bus garage at the school, where decedent routinely spent time during his bus runs. The jury awarded the plaintiff the following: three million dollars in conscious pain and suffering; three million dollars in emotional pain and suffering between the onset of the decedent's disease and death; 200,000 dollars for loss of services and society from the onset of the decedent's disease until his death; one million dollars for wrongful death from the date of death until the verdict, and; 500,000 dollars for wrongful death from the date of verdict until the time decedent would have otherwise been expected to live. All told, the verdict amounted to 7.7 million dollars and Navistar was the only defendant remaining at trial.

The defendant filed the following post-trial motions: motion to set aside the jury's verdict and dismiss the action; motion for new trial on all the issues; motion for new trial on the issues of allocation of fault or the award of future damages. Navistar advanced five separate arguments in support of its motions: 1) the causation opinions of the plaintiff's expert, Dr. Abraham, were inadmissible and the plaintiff presented insufficient evidence of general or specific causation; 2) Navistar owed no duty to warn a bystander like the decedent and the plaintiff failed to provide sufficient evidence of causation with respect to the alleged failure to warn; 3) new trial should be ordered to correct errors in evidentiary rulings; 4) the court failed to instruct the jury on the issue of apportionment of liability; 5) the jury's damage awards should be substantially remitted because they were based on legal errors and were otherwise excessive.

First, the court determined that Dr. Abraham's testimony met the standards set forth in prior case law in that there was a foundation or scientific expression of an exposure level sufficient to cause the decedent's mesothelioma, based on witness testimony of the frequency, duration, and level of the decedent's exposure coupled with studies of the asbestos fiber content of dust generated by brake work in a garage setting. All of this constituted sufficient quantitative evidence of the decedent's exposure to asbestos. Dr. Abraham did not rely on the "each and every exposure theory" and the jury was appropriately given the opportunity to resolve the credibility and contentions of the plaintiffs' and the defendant's experts.

Second, the jury could reasonably infer negligence and causation. Navistar provided no warnings on its brake products until the 1980's. The cases cited by the defendant in its motion dealt with instances where alleged inadequate warnings were provided but not read by plaintiff, as opposed to no warnings given at all.

Third, there were no evidentiary errors because Navistar's and the plaintiff's experts were permitted to testify and generally agreed on the qualitative differences in the potency of chrysotile and other forms of asbestos. Navistar presented a considerable amount of evidence that exposure to chrysotile from brake work did not cause decedent's mesothelioma.

Fourth, there was no prima facie evidence from which the jury could allocate liability or apportion equitable shares. Navistar had the burden to prove the proper amount of equitable shares of culpability attributable to other companies, including evidence of lack of warnings. Navistar failed to meet its burden to prove that any other companies were negligent in that they had notice of or disregarded the dangers of asbestos in their products.

Fifth, the court looked to recent jury awards with similar fact patterns, and subsequent reductions thereof, when determining whether remittitur was appropriate in the instant matter. The Appellate Division, First Department consistently held awards up to three million dollars per year for pain and suffering; the court reduced any verdict above that amount. With that guidance, the court held that the present verdict of six million dollars for pain and suffering was "excessive to the extent it exceeds three million" and reduced the verdict accordingly. The court followed similar logic when examining the wrongful death claims. The plaintiff offered no specific values of "the cost of a maintenance person, nurse, driver or any other individual to perform the types of services Mr. Nash provided for his wife" and therefore, the court reduced the total award for wrongful death from 1.5 million to 270,000 dollars, a similar reduction in award to other recent cases. Lastly, the court held that 200,000 dollars for loss of services and society was similar to other recent decisions and determined no reduction was necessary.

The total damages award was reduced from $7.7 million to $3.47 million; this award was to be further reduced by amounts collected from and/or to be paid by settled entities.

Read the full decision here.

Compressor Manufacturer's Appeal Denied Based on Finding of Substantial Contribution to Decedent's Disease (VR)

(Court of Appeal of Louisiana, Third Circuit, August 2, 2017)

Myra Williams died on August 8, 2013 of complications from malignant mesothelioma. Plaintiff Jimmy Smith, along with his four children, filed suit against several defendants alleging that their products cause Myra's mesothelioma. Smith alleged that he was exposed to asbestos fibers while working at the Placid Oil Facility in Natchitoches, Louisiana. Smith unknowingly brought fibers and dust home on his clothing after each day of work. Myra would handle and wash Jimmy's clothing, and sustained what is commonly referred to as bystander asbestos exposure. Ingersoll–Rand was the manufacturer of ten compressors that were installed in the "compressor room" of the Placid Oil facility. The turbo chargers and exhaust pipes for each compressor were insulated with asbestos. The plaintiffs also elicited testimony that the Ingersoll–Rand compressors had asbestos gaskets on them, which came directly from Ingersoll–Rand.

After a three-day bench trial, the trial court issued a judgment, accompanied by written reasons for judgment. Prior to trial, the plaintiffs settled with Placid Oil, Shreveport Rubber & Gasket and General Electric. That left Ingersoll–Rand as the only named defendant that proceeded to trial. As to the survival action, the trial court found Placid Oil and Ingersoll–Rand were at fault in causing Myra's mesothelioma and were each liable for their virile share. In regard to the wrongful death action, the trial court concluded that under the law Ingersoll–Rand was solely at fault in causing Myra's mesothelioma. Myra was awarded $3,000,000.00 in damages for her survival action. As to the wrongful death actions, Jimmy was awarded $1,000,000.00, and each of the four children were awarded $750,000 each. Ingersoll-Rand appealed the judgment of the trial court to the Third Circuit Court of Appeal of Louisiana.

The main argument on appeal was that Ingersoll-Rand claims the trial court erred in concluding that plaintiffs had proven a causal connection between the decedent's disease and Ingersoll–Rand Company products. The standard of proof, developed by Louisiana courts over years of asbestos litigation, is known as the "substantial factor" test. A plaintiff must prove, by a preponderance of the evidence that: (1) her exposure to the defendant's asbestos product was significant; and (2) that this exposure caused or was a substantial factor in bringing about her mesothelioma. Based on the testimony elicited in depositions and discovery, the Court of Appeals found no error on the trial court's part in finding Myra's exposure to asbestos as a result of Jimmy's work with the Ingersoll–Rand compressors, was significant, and the exposure was a substantial factor in the development of her mesothelioma.

Additionally, the court found the trial court properly declared summary judgment to co-defendant J. Graves insulation, the trial court properly assigned responsibility in the survival action, the trial court properly assigned responsibility in the wrongful death action, and the trial court's damages were not excessive in the wrongful death action. As such, the judgment of the lower court was affirmed in all respect.

Read the full decision here.

Louisiana Court of Appeal Finds $500K Jury Verdict Not Enough

(Court of Appeal of Louisiana, Fourth Circuit, May 24, 2017)

Plaintiffs Frank Romano, Sr. and Lynne Rome Romano filed suit in the Civil District Court, Orleans Parish against a number of defendants on September 12, 2014, after Romano contracted mesothelioma allegedly caused from occupational asbestos exposure. For a brief background, Romano grew up in Marrero, Louisiana and lived about two blocks away from the Johns-Manville Corporation's plant for 20 years before he went away for college. As a result of this Johns-Manville connection, two defendants filed a third party demand against CRMC, a successor in interest to Johns-Manville. After college, Romano worked at defendant Union Carbide Corporation's (UCC) Taft facility for nine to ten months during 1967 and 1968. For the majority of time that he worked at the Taft facility, Romano was assigned to the stores department, where his occupational asbestos exposure was thousands of times above background levels on a daily basis.

The case ultimately proceeded to a jury trial against UCC and went forward on March 14, 2016 through March 14, 2016. Here, the jury returned a verdict in favor of the plaintiffs and against the defendants for the following awards:

- $566,274.00 in stipulated past medical expenses;
- $150,000.00 in future medical expenses;
- $250,000.00 for loss of enjoyment of life, past and future; and
- $250,000.00 for general damages, including past and future physical pain and suffering, past and future mental anguish, and past and future disability.

Both parties filed post-trial motions that were denied. The plaintiff argued that the awards were grossly inconsistent with the evidence adduced at trial in similar cases. UCC requested a verdict reduction for Johns-Manville's allocation of fault. The plaintiff and UCC both appealed and each argument was heard by the Court of Appeal of Louisiana, Fourth Circuit.

On appeal, among other arguments, UCC asserted that the trial court erred in not reducing the jury verdict by one-half for the fault of Johns-Manville because it is treated as a settled party under Louisiana law and under the provisions of its settlement trust. The Court of Appeal noted that under pre-comparative fault law in Louisiana, which governs this case, joint tortfeasors were solidarily ("jointly and severally") liable for a tort victim's injury. Under solidary liability, the obligee (i.e. plaintiff), at his choice, could demand the whole performance from any of the joint and indivisible obligors (i.e. defendants). Therefore, the only remedy available to a solidary defendant from whom the whole performance was sought was to seek "contribution" from the joint tortfeasors in the amount of the joint tortfeasor's allocated share. [Citation Omitted]. In order for a solidary defendant to receive this allocated credit, they must show that (a) the plaintiff released a party, thereby precluding the remaining solidary defendants from seeking contribution from it, and (b) that the released party's liability is established at trial. In the current matter, the Court of Appeal found that the plaintiff never settled with Johns-Manville and thus UCC was not entitled to this allocated credit under Louisiana's solidary liability law.

The plaintiffs also argued on appeal that 1) the jury abused its discretion when it awarded general damages to plaintiffs in the amount of $250,000.00 for Romano's past, present and future pain and suffering and an additional $250,000.00 for Romano's past, present and future loss of enjoyment of life; and 2) the district court abused its discretion when it denied the plaintiffs' motion for partial judgment notwithstanding the verdict on damages only, or, in

the alternative, motion for partial new trial on damages only because the jury's award was grossly below other mesothelioma verdicts in this state.

In review of the plaintiffs' arguments, the Court of Appeal emphasized noted that the role of an appellate court in reviewing a general damages award is not to decide what it considers to be an appropriate award but rather to review the exercise of discretion by the trier of fact. To determine whether the fact finder has abused its discretion, the reviewing court looks first to the facts and circumstances of the particular case. Only if a review of the facts reveals an abuse of discretion, is it appropriate for the appellate court to resort to a review of prior similar awards. In a review of the facts, the test is whether the present award is greatly disproportionate to the mass of past awards for truly similar injuries. [Citation Omitted].

The court ultimately found that, based on the evidence put on at trial, Romano will most likely die from mesothelioma. Combining that fact, in combination with their review of the other cases, the court found the general damages award of only $500,000.00 appeared far too low. Upon further review of other verdicts, these numbers indicated that Romano's general damages award should be somewhere in the $1.5 million to $2 million range. Due to instruction by jurisprudence to only raise a general damage award to the lowest reasonable amount that a trier of fact could have awarded, the court raised the amount of general damages awarded to the plaintiffs from $500,000.00 to $1,500,000.00.

In sum, the Court of Appeal of Louisiana affirmed the trial court's decisions regarding the reduction of the verdict as to Johns-Manville and reversed the jury's verdict as to damages only and the trial court's judgment denying the plaintiffs' motion for partial judgment notwithstanding the verdict on damages only, or, in the alternative, motion for new trial on damages only, and increased the general damages award made to the plaintiffs from $500,000.00 to $1,500,000.00.

Read the full decision here.

Missouri Appeals Court Affirms $10M Punitive Damage Award Against Valve Manufacturer

(Missouri Court of Appeals, Eastern District, May 2, 2017)

Jeannette G. Poage, the plaintiff, filed a products liability suit against defendant Crane Co. in the Circuit Court of the City of St. Louis, alleging that her husband, James E. Poage, suffered personal injuries and wrongful death from mesothelioma, which was caused from Mr. Poage's work with the defendant's products. Mr. Poage served in the U.S. Navy from 1954-58 as a machinist on the USS Haynesworth where he helped maintain the valves on the ship that required replacing gaskets and packing. The plaintiff alleged that some of these valves, gaskets, and/or packing contained asbestos and were manufactured by the defendant. The plaintiff asserted both strict liability and negligence claims arguing that Mr. Poage's work with the defendant's products caused him to inhale asbestos dust, which subsequently caused his mesothelioma, and ultimate death in 2012. Mr. Poage was not deposed he passed aware prior to the plaintiff filing this claim.

The case went to trial from June 23, 2015 to July 2, 2015 and the jury returned a verdict in favor of the plaintiff with an award of $1.5M in compensatory damages and $10M in punitive damages. On September 14, 2015, the trial court entered a judgment of a reduced compensatory award of $822,250 based on settlement agreements with other defendants, along with the $10M punitive damage award. The trial court overruled all of the defendant's post-trial motions. The defendant appealed to the Missouri Court of Appeals, Eastern District, Division Two, arguing (1) the plaintiff failed to meet her burden of proving necessary factual pre-requisites for a submissible claim and (2) a reversal, or at least a substantial reduction, of the plaintiff's award of punitive damages.

Submissible Claim

As to the defendant's first point, the plaintiff failed to make a submissible claim because she (i) failed to establish cause in fact; (ii) failed to establish proximate cause; and (iii) the defendant owed no duty to Mr. Poage because during his Navy service, the defendant did not manufacture or supply the gaskets and/or packing Mr. Poage allegedly worked with. Upon review of the record, this Appeals Court found that the plaintiff presented sufficient evidence for a reasonable jury to conclude that the defendant was liable under theories of both strict liability and negligence. Additionally, it was sufficiently established that the defendant owed a duty to Mr. Poage to warn, that the defendant defectively designed its valves in an unreasonably dangerous manner, and such conduct was the proximate cause of Mr. Poage's death. Accordingly, the Appeals Court denied the defendant's first point and affirmed the trial court's ruling.

Punitive Damages

The defendant contends the trial court erred in entering judgment as to punitive damages on, among others, two main points: (i) The plaintiff submitted no evidence that the defendant's conduct was outrageous or done with "complete indifference to or conscious disregard for the safety of others;" and (ii) The plaintiff failed to adduce evidence demonstrating the defendant knew or had reason to know there was a high probability of causing injury to Navy seaman.

Upon review of the record, this court noted that the defendant did not expressly admit to having actual knowledge of asbestos' danger or the probability its valves would cause injury. "However, circumstantial evidence alone is not a bar to recovery, and the evidence on the record supports a conclusion that Defendant had actual knowledge their valves had a high probability of causing lung related diseases." Therefore, in reviewing the evidence in the light most favorable to the plaintiff, the court found sufficient evidence to satisfy the knowledge requirements for these claims. However, a finding of actual knowledge alone is not sufficient to conclude the defendant's conduct was "outrageous" and/or committed with conscious disregard or indifference for others but it does provide support for that conclusion. [Citation Omitted]. Based upon this support, and other testimony in the record, the court found sufficient evidence for a jury to conclude with clear conviction that the defendant's actions giving rise to this suit were committed with conscious disregard or complete indifference.

The defendant put forth additional arguments as to the punitive damages claim including the award was grossly excessive and exceeded fair and reasonable compensation. Here, the court found, under Missouri law, there was nothing that led to the conclusion that the trial court's verdict was so grossly excessive that it shocks the conscious of the court.

Accordingly, the Missouri Court of Appeals, Eastern District, Division Two, affirmed the trial court's judgment and upheld the plaintiff's verdict award of $822,250 in compensatory damages and $10M in punitive damages.

Read the full decision here.

Boiler Manufacturer Granted New Trial Due to Plaintiff's Counsel's Comments in Closing Arguments

(Court of Appeals of Iowa, April 19, 2017)

Defendant Weil McLain appealed the jury's award of damages and punitive damages to plaintiffs to the Iowa Court of Appeals. The appeal stems from the death of Larry Kinseth as a result of his alleged exposure to asbestos containing products. Mr. Kinseth worked in the heating and plumbing industry beginning in 1957. As part of his work, he tore out old boilers and installed new boilers, both in residential and commercial applications. At the time, Mr. Kinseth was working in the heating and plumbing industry, boiler manufacturers sealed their products with asbestos as it was a fire retardant, and Mr. Kinseth was exposed to asbestos dust. Some of the boilers Mr. Kinseth installed were manufactured by Weil-McLain.

In the pre-trial conference, the court granted Weil-McLain's motion in limine and ruled that the plaintiffs could not refer to the amount of money Weil-McLain spent on its defense or make any argument about the need for the jury to send the defendant a message through its verdict. After closing arguments, Weil-McLain filed a motion for a mistrial, claiming various comments by counsel for the plaintiffs violated the court's rulings on the motion in limine in statements to the jury. The court denied the motion. The jury returned a significant verdict for the plaintiffs and found Weil-McLain was 25 percent at fault.

Weil-McLain appealed, claiming the district court should have granted its motions for mistrial due to the statements of the plaintiffs' counsel during closing arguments. After reviewing the closing arguments, the Court of Appeals agreed with Weil-McLain finding that the plaintiffs' counsel made multiple statements that were barred by the court's ruling on the motion in limine. Specifically, the plaintiffs' counsel referenced the amount of money Weil-McLain spent in defending the case highlighting the corporate wealth of Weil-McLain in contrast to that of the plaintiffs. The court noted that these errors were significant enough to prejudice the jury and more than simple error. In reversing the decision, the court commented, "This continuous disregard for the court's rulings could not have been "a slip of the tongue" and was not an isolated incident." As such, the Iowa Court of Appeals remanded the case for a new trial.

Read the full decision here.

California Appellate Court Reverses $3.6M Punitive Damages Award

(Court of Appeal of California, Second Appellate District, Division One, February 15, 2017)

In November 2005, after William Saller was diagnosed with mesothelioma, the plaintiffs filed suit naming 22 defendants, including the manufacturers of various asbestos products. After Saller passed away in February 2006, his wife and daughters added a wrongful death claim and continued the lawsuit.

In 2007, the plaintiffs proceeded to trial against two remaining defendants: Crown Cork and Bondex International, Inc. The jury returned a defense verdict, rejecting the plaintiffs' strict liability design defect claim and their negligent failure-to-warn claim. The plaintiffs appealed and the appellate court ordered a new trial, ruling that the trial court erroneously refused to instruct the jury on two of the plaintiffs' theories of liability — the "consumer expectations" theory of design defect and strict liability for failure to warn. Bondex filed for bankruptcy protection while this appeal was pending, leaving Crown Cork as the only defendant remaining for the retrial.

The retrial, which began on November 19, 2013, was bifurcated into a liability phase and a punitive damages phase. The jury now returned a verdict in favor of plaintiff on all claims:

- Design defect by Crown Cork (11-1 vote) and that defect was a substantial factor in causing Saller's mesothelioma (12-0 vote);
- Failure to warn by Crown Cork (11-1 vote) and that failure to warn was a substantial factor in causing Saller's mesothelioma (12-0 vote);
- Negligence by Crown Cork (9-3 vote) and that negligence was a substantial factor in causing Saller's mesothelioma (10-2 vote);
- The jury also found by clear and convincing evidence (by a 10-2 vote) that Crown Cork was guilty of malice.

The punitive damages phase was tried on December 16, 2013, and the jury, by a vote of 9-3, returned a punitive damages award of $3.6M. After taking into consideration liability allocation and set-offs, the trial court entered judgment in favor of the plaintiffs against Crown Cork for $1.365 million in noneconomic damages, $131,543.22 in economic damages and $3.6 million in punitive damages. Crown Cork's post-verdict motions were denied and they timely appealed.

On appeal, Crown Cork challenged the judgment in two ways. First, Crown Cork contended, as to liability, that the trial court erroneously refused to instruct the jury on the sophisticated intermediary defense and the jury's finding against Crown Cork on the consumer expectation theory of design defect was unsupported by substantial evidence. Second, Crown Cork argued that the punitive damages award was flawed both legally and factually.
On February 15, 2017, the Court of Appeal of California, Second Appellate District, Division One reviewed arguments on appeal, and found (1) the trial court properly refused to instruct the jury on the sophisticated intermediary defense because there was insufficient evidence to justify such an instruction; (2) the jury's finding on the consumer expectation theory of design defect was supported by substantial evidence; and (3) the punitive damages award was unsupported by substantial evidence because the plaintiffs' expert could offer testimony only about the financial condition of Crown Cork's parent, Crown Holdings. Because the plaintiff had a full and fair opportunity to developed and present their case of punitive damages and there was no evidence of an ability of to pay by the actual defendant (Crown Cork), the punitive damages award was reversed and *was not* remanded for a retrial. Under those circumstances, the plaintiffs do not get a second bite of the punitive damages apple.

Accordingly, the court reversed the punitive damages award and affirmed on all other counts.

Read the full decision here.

Verdict Against Brand Insulation Upheld on Various Grounds, Including that General Negligence Duty of Care Recognized for Take Home Exposure

(Court of Appeals of Washington, January 23, 2017)

The trial court found in favor of the plaintiff, finding Brand Insulation, Inc. liable for the mesothelioma suffered by Barbara Brandes due to secondary asbestos exposure from her husband's work at ARCO. Brand appealed, and the plaintiff appealed the remittitur reducing the damages award from $3.5 million to $2.5 million. The court affirmed the verdict and reversed the remittitur.

Brand was an insulation subcontractor during construction of the ARCO Cherry Point Refinery. At first Brand installed asbestos-free insulation, but later switched to asbestos insulation due to poor performance. The plaintiff's husband Raymond was an operator at the refinery, and the plaintiff washed his clothes. The plaintiff died prior to closing argument. Prior to trial, Brand moved for summary judgment on numerous grounds, including the contractor's statute of repose.

First on appeal, Brand argued the six year construction statute of repose barred the plaintiff's claims because the insulation was an improvement on real property. The court considered whether it should analyze this issue after the case proceeded to trial and judgment. Washington case law held that once a trial on the merits was held, denials of summary judgment may be reviewed where the disputed issues of fact were not material and the decision turned solely on a substantive issue of law. Here, the disputed facts were material, because they included whether the insulation was integral to the refinery. Since material disputed facts were resolved by the trier of fact, the summary judgment order could not be appealed because it was followed by a trial.

Second, Brand argued that no precedent established a duty of care in a take-home exposure case where the defendant did not have control over the actions of the individual exposed to asbestos. Here, Brand's failure to label the insulation as containing asbestos and failure to contain the asbestos dust created an unreasonable risk of harm. Exposure of families to this dust was foreseeable. Although Brand argued that Washington law recognized a duty for take-home exposure only for strict liability and premises liability where the premises owner was also the general contractor, the court stated that: "The recognition of a duty of care in the context of strict liability and premises liability does not preclude recognizing such a duty here under well-established principles of negligence."

Third, Brand argued that since the plaintiff did not demonstrate how much asbestos she was exposed to, there was an insufficient basis on which to find causation. The court reviewed the four elements outlined by Washington law in determining whether defendant's conduct was a substantial factor in causing plaintiff's harm. The evidence in this case was sufficient for the jury to find causation.

Fourth, Brand argued the trial court erred in instructing the jury to consider whether Brand was negligent with respect to its sales of insulation at the refinery; under the Restatement (Second) of Torts definitions of "seller" and "supplier," it was neither. Again, the evidence in this case showed that Brand was both, because it ordered, supplied, and sold the insulation.

Fifth, the court found that the trial court did not err in refusing to give a "contractor's defense" instruction. Brand also argued the trial court erred in allocating 20 percent of settlement proceeds to a future wrongful death claim, because the settlement of plaintiff's personal injury claim extinguished a wrongful death claim. The court pointed out that under principles of joint and several liability, Brand opposed the allocation because it reduced the amount of set-off. The trial court did not err.

The trial court also did not err in permitting the work simulation video because demonstrative evidence was appropriate when conditions in the video were substantially similar to real life. Further, although the plaintiff died during trial, the amount of damages was not unmistakably the result of passion or prejudice, and was supported by substantial evidence, such that remittitur was reversed.

Read the full decision here.

Discovery Decisions

After Close of Discovery Motion for Release of Pathology Materials Granted

(U.S. District Court for the Eastern District of North Carolina, November 3, 2017)

Defendant John Crane filed a motion for an order governing the release of pathology materials following the close of discovery. Although pathology materials had been requested from the plaintiff's counsel nearly a year and a half prior to the discovery end date, they were not produced until eight days after that deadline had passed. John Crane then learned that there were additional pathology materials in the possession of Duke University Hospital System (DHUS). John Crane requested the additional slides in April 2017, to which the plaintiff's counsel objected. In July 2017, DHUS informed John Crane that it would not voluntarily release the additional pathology materials, even if DHUS' conditions for release were met. John Crane then filed a motion for leave to file the motion for order governing the release of pathology materials. The plaintiff opposed the motion for leave but not the substantive motion. DHUS filed a motion for protective order governing the release of the pathology materials, which was unopposed.

After reviewing the facts concerning John Crane's pursuit of the materials, the court found that good cause existed for the modification of the discovery deadline because John Crane did not learn of the additional materials until after the discovery deadline had passed, and exhibited diligence in timely requesting the materials. The court therefore granted both of John Crane's motions. The court then granted DHUS' motion for protective order in order for DHUS to comply with extensive federal regulations.

Read the full decision here.

Conflicting X-Ray Reports Subject for Cross-Examination, Not Grounds to Compel a CT Scan

(Superior Court of the Virgin Islands, August 23, 2017)

Defendants Hess Oil Virgin Islands Corporation and Hess Corporation filed a motion to compel plaintiff Andrew Wilson to undergo a CT scan of his chest to determine whether there was any objective evidence of lung disease. The court denied the motion to compel.

Wilson alleged asbestos exposure and the development of asbestosis due to his work at the oil refinery on St. Croix in the U.S. Virgin Islands. The plaintiff's case was consolidated with over a hundred cases. The court ordered the plaintiffs to provide medical records or releases and to submit to a medical examination by a physician chosen by the defendants. The defendants agreed to request a CT scan only for those plaintiffs for whom Dr. James Crapo, the doctor chosen by defendants, and Dr. John, the doctor hired by the plaintiffs. If Dr. Crapo and Dr. John disagreed as to which plaintiffs required a CT scan, the defendants were entitled to seek a court order compelling this test. The defendants thus filed a motion to compel a CT scan of the plaintiff.

The defendants argued that the plaintiff's sole objection to the chest CT scan was that Dr. John did not agree with Dr. Crapo that one was required. The plaintiff argued that the defendants only requested a CT scan because the radiologist, Dr. Galiber, gave a conflicting reading, and the plaintiff already did a medical examination and chest x-rays. Thus, the defendants have not shown good cause because a CT scan was not necessary to diagnose occupational lung disease.

The court noted the lack of precedent regarding Virgin Islands Rule of Civil Procedure 35(a)(1), which provided that the court may order a party to submit to a medical examination. The practice was to apply the Federal Rules of Civil Procedure and local rules. After an extensive discussion of the rules of precedent, the court stated that it should look to the body of law first to harmonize its case law. Thus the court relied upon *Sloan v. Cost-U-Less, Inc.*, 2001 WL 1464769 (Terr. V.I. 2001) from the Territorial Court of the Virgin Islands, for guidance. Sloan found that courts may order an examination, but when the plaintiff already had one examination a stronger showing of necessity may be required.

Here, the plaintiff clearly put his physical condition at issue, and the court was not persuaded by his objection that a CT scan would provide no benefit. The plaintiff also objected due to the risks associated with CT scans through the high dose of radiation, and that should further injury result, would he have a right to sue defendants' hired doctors for malpractice? The court noted that the defendants did not reply to the plaintiff's opposition to its motion to compel, and a reply would have greatly helped the court in analyzing plaintiff's valid concerns; "…the arguments of counsel cannot unravel this Gordian knot." Nevertheless, the court rejected the plaintiff's potential claim for malpractice because it was not its responsibility, at this time, to decide whether such an examination would give rise to a doctor-patient relationship.

However, the court accepted the plaintiff's concern about the potential risks associated with a CT scan. The court quoted the plaintiff: "…[a] [d]efendant cannot endanger or increase the risk of harm to a [p]laintiff in their medical testing. Courts recognize the need to balance the invasiveness or danger of any given requested procedure with its probative value." Although the plaintiff did not move for a protective order, he raised a legitimate concern; more importantly, defendants did not ask that plaintiff be ordered to undergo a CT scan because Dr. Crapo discovered something abnormal on his x-rays. "That is, the reason for requesting a CT scan is not medical but legal: getting a clearer picture of Wilson's lungs for discovery purposes because Dr. Galiber read two x-rays of the same man and reached contradictory conclusions for each…Such conflicts are for cross-examination."

Read the full decision here.

Favorable Defense Discovery Rulings, Including Preclusion of Treating Physicians from Testifying as Experts

(U.S. District Court for the Eastern District of Louisiana, February 2, 2017)

The district court issued two opinions in the same case, issuing various rulings on motions brought by both parties. The plaintiff alleged he developed lung cancer from asbestos exposure while employed by Freeport Sulphur Company, predecessor to Mosaic Global Holdings, Inc. This case started in Louisiana state court, and was removed by Mosaic. The primary rulings on these motions are summarized below.

The plaintiff moved to exclude evidence of settled claims and collateral sources of compensation. The defendants argued that both settlement agreements and collateral sources may be admissible to show bias or for other limited purposes. While the court agreed that Federal Rule of Evidence 408, which excludes this type of evidence, was not a "blanket ban," the court must also balance the exception against the public policy objectives. The court denied the plaintiff's motion, since neither party argued specifics; neither party identified which settlements should be excluded, and the briefing regarding collateral sources was similarly academic. However, the court did rule that this evidence would not be admitted without express permission of the court.

The plaintiff argued that the defendants made a judicial admission in its motion for summary judgment regarding his asbestosis, which the defendants denied. Judicial admissions withdraw facts from contention. Since the defendant's motion did not meet the standard for judicial admissions, this was denied.

The plaintiff moved to exclude a consultation note made by his doctor regarding his smoking history, and argued it was hearsay. The defendants argued it was admissible under the business records exception. After examining various affidavits produced by both parties regarding how these records were kept, the court rejected the plaintiff's hearsay and authenticity arguments. The Fifth Circuit did not require conclusive proof of authenticity before allowing the admission of disputed evidence, and the defendants presented sufficient evidence to support a finding that the doctor's record was what its' proponent claimed it to be.

Finally, the defendants moved to exclude expert opinion testimony from the plaintiff's treating physicians, arguing the plaintiff failed to comply with expert disclosure requirements. The defendants also argued the physicians were not qualified to give opinions as to the cause of the plaintiff's illness. The court granted this motion, because the plaintiff failed to meet the applicable disclosure requirements. The plaintiff produced no Rule 26(a)(2)(C) disclosure, and pursuant to Rule 37(c)(1), the failure to disclose results in mandatory and automatic exclusion. Further, due to the complexity of asbestosis and lung cancer, and the specialized knowledge required to assess these diseases, treating physicians who did not provide a report or disclosure under Rule 26 were limited to lay testimony only.

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

Certain Bankruptcy Trust Information Ruled Discoverable in Louisiana

(U.S. District Court for the Eastern District of Louisiana, January 23, 2017)

The plaintiff alleged he developed lung cancer due to his asbestos exposure while working on the premises of Freeport's Port Sulphur facility, other facilities, and various drilling rigs. The defendants removed to federal court on the bases of original jurisdiction under the Outer Continental Shelf Lands Act. The plaintiff filed a motion to quash subpoena and notice of records deposition, and a motion for protective order. The court analyzed both at the same time, as both contained substantially the same arguments.

Defendant McCarty Corporation issued a notice of records deposition and subpoena to Timothy Young of The Young Firm, seeking information provided to any bankruptcy trusts and any settlement documents and checks reflecting payment made to plaintiff. The Young Firm represented the plaintiff in an earlier asbestosis suit that was dismissed. The plaintiff argued these documents were not discoverable. McCarty noted that the plaintiff did not sue it in his earlier litigation, and argued this information was necessary to demonstrate fault of other parties.
Defendant GE issued a notice of records deposition and subpoena to Malissa Antonucci, Manville Personal Injury Settlement Trust, seeking production of claims and related documents referencing the plaintiff.

Several states — but not Louisiana — have enacted litigation to reduce the suppression of evidence in analyzing causation. McCarty argued the plaintiff's claims were subject to Louisiana's pre-comparative fault law, which allowed credit for non-settling defendants if settled entities were proven to be at fault. McCarty also argued that the settlement

agreements were discoverable to establish whether the plaintiff reserved or waived rights to potential recoveries from released parties.

The court noted: “Federal and state courts have routinely held that claims submitted to asbestos bankruptcy trusts are discoverable.” However, documents provided from the trusts to the plaintiffs regarding offers of compromise or settlement amounts were not discoverable. The court agreed with the reasoning by other jurisdictions, and held that all documents plaintiff submitted to the bankruptcy trusts, including claim forms, supporting documentation, and supplemental information were discoverable. Settlement information requested in both subpoenas was not discoverable.

Read the full decision here.

Expert Challenges Decisions

Lack of Product Specific Expert Testimony About Respirable Asbestos Fibers Reverses Mesothelioma Verdict

(Supreme Court of Connecticut, November 2, 2017)

Plaintiff Marianne Bradley, as executrix of her husband Wayne Bagley’s estate, sought to recover damages pursuant to Connecticut’s Product Liability Act for the wrongful death of the decedent under theories of negligence and strict liability. Plaintiff alleged that the decedent was exposed to asbestos-containing dust from FM-37, a product manufactured by the defendant, while working at Sikorsky Aircraft Corporation and this exposure caused decedent’s mesothelioma. The plaintiff further alleged that the defendant’s actions in selling its product constituted violations of the Act in that its product was unreasonably dangerous and that the defendant knew or should have known that its product was inherently dangerous and yet failed to use reasonable care by not testing the product to ascertain its danger or removing the product from the marketplace.

For approximately ten months in 1979 and 1980, the decedent worked as a manufacturing engineer in the blade shop at Sikorsky, where various helicopter blades were manufactured. The decedent’s office was located on a mezzanine overlooking the blade shop; a coworker testified that decedent often entered the production areas to assist in resolving various issues. During that time frame, the defendant manufactured FM-37 and sold this product to Sikorsky. FM-37 was used in the blade shop to bind together interior components of helicopter blades. The product was a modified epoxy material, supplied in sheet form with strippable release paper, and contained 8.6 percent asbestos. In regular usage, FM-37, after application, was heated until it foamed and expanded. When it expanded onto areas of the blades where it was not supposed to be, it was removed by chiseling or sanding. The product information sheets supplied by defendant for FM-37 did not indicate it contained asbestos and further stated that it could be sanded after curing. The decedent’s coworker testified that the decedent was present when FM-37 was sanded which would have exposed him to visible dust and that the sanding room was equipped with a ventilation system that collected some of the dust.

The plaintiffs’ proffered three experts at trial: Dr. Barry Castleman, Dr. Arnold Brody, and Dr. Jerrold Abraham. Dr. Castleman, an expert in public health and the history of the asbestos industry, opined that a company producing an adhesive product in 1979 would have been aware that relatively low exposures to asbestos, which might occur from sanding, could cause mesothelioma and that company could have done air sampling under foreseeable conditions of use to determine what level of exposure would be created. Dr. Castleman did not examine FM-37 and did not know what percentage of it was asbestos. Dr. Brody, a pathologist, testified as to the process by which asbestos causes mesothelioma. Dr. Brody did not examine any case-specific materials; his presentation was premised on the assumption that a person has been exposed to respirable asbestos fibers. Dr. Abraham, a pathologist and expert on pulmonary pathology, reviewed decedent’s medical records and a pathology slide. Dr. Abraham opined that the decedent had mesothelioma and that a proximate cause of that disease, amongst others, was the decedent’s exposure to asbestos from FM-37 in the blade shop. Dr. Abraham did not inspect FM-37 or speak with anyone at Sikorsky about the ventilation in the sanding room in 1979 or 1980 when rendering his opinion.

After the plaintiff rested her case, the trial court denied the defendant’s motion for a directed verdict, concluding that the plaintiff presented sufficient evidence to support her theories of liability. Specifically, the defendant argued that the plaintiff had failed to present any evidence of either a design defect of FM-37 or that asbestos dust from FM-37 had caused the decedent’s injuries and death. The defendant further argued that expert testimony was required to prove both the dangerousness of FM-37 and that the dust contained asbestos fibers that were released from FM-37 at a

level sufficient to cause mesothelioma. The defendant filed a motion to set aside the verdict and for judgment notwithstanding the verdict after the jury returned an award in favor of the plaintiff, both of which were denied.

The defendant appealed the case to the Connecticut Supreme Court, reiterating the same arguments it made to the trial court. The court held that the plaintiff's case "lacked essential expert testimony to prove a vital fact in support of her negligence and strict liability claims, namely, that respirable asbestos fibers in a quantity sufficient to cause mesothelioma were released from FM-37 when it was used in the manner that it was in the Sikorsky blade shop during decedent's tenure there." The plaintiff proved that breathing respirable asbestos fibers above ambient levels can cause mesothelioma, that FM-37 contained 8.6 percent asbestos, that FM-37 was sanded and produced dust, and that decedent was both directly and secondarily exposed to that dust, but crucially did not establish that the dust from FM-37 necessarily contained respirable asbestos fibers. The court further stated that the question of whether respirable asbestos fibers were released when sanding a modified epoxy adhesive product after it has been heated and cured, is a technical question that can only be answered by lay jurors after competent expert testimony.

The plaintiff argued that if the defendant's motions were granted, a new trial was warranted based on Connecticut jurisprudence that existed at the time of trial, but had favorably evolved towards defendant's benefit throughout the appeals process. The court held that the requirement of an expert to prove whether the defendant's product emitted respirable asbestos fibers when sanded, subject matter that was technical in nature and beyond the field of ordinary knowledge of a lay juror, was required under well-established law at the time of the trial.
The court reversed the judgment and remanded the case with the direction to grant the defendant's motion to set aside the verdict and for judgment notwithstanding the verdict.

Read the full decision here.

$8.5 Million Verdict Affirmed Against Premises Defendant

(District Court of Appeal of Florida, Third District, September 6, 2017)
Plaintiffs Dennis Britt and Rosa-Maria Britt filed suit after Dennis Britt was diagnosed with mesothelioma. Britt ultimately passed away from the disease and Rosa-Marie Britt continued as personal representative of his estate and added a wrongful death claim.

Britt was an employee benefits advisor from 1978-1997 where he visited various commercial and industrial facilities to speak with, and enroll, employees of these facilities, some of which were owned and operated by the defendant. Prior to his death, Britt testified that during the course of his visits, and while on the premises of the defendant's facilities in New York and California, he was exposed to and inhaled asbestos fibers. At trial, the plaintiff introduced evidence that the defendant's New York and California facilities contained asbestos-insulated pipes that released airborne fibers, in close proximity to Britt, during frequent maintenance activities. Britt further testified that he was on site at one of the defendant's facilities each year from 1979 into the mid-1980s, and in areas where these maintenance activities were conducted, amounting to an estimate of over 500 days of exposure. The plaintiff also provided expert testimony stating that Britt's exposure to asbestos was a substantial cause of his mesothelioma and eventual death.

This case ultimately went to trial, and after one week, the jury rendered a verdict in favor of the plaintiff awarding a total of $519,265.60 in medical and funeral expenses and $8,500,000 in compensatory damages. The defendant appealed, and argued among other things, that the (1) trial court erred in allowing the admission of expert testimony of Dr. Murray Finkelstein, in that his methodology, was equivalent to an "any exposure" or "single fiber" causation opinion and (2) trial court erred in excluding evidence as to nonparties that may have exposed Britt to asbestos during his career, depriving defendant of an apportionment of liability on the verdict sheet.
The District Court of Appeal of Florida, Third District, reviewed the appeal, found no reversible error as argued by the defendant, and affirmed the verdict and final judgment. The court addressed the defendant's arguments as follows:

Admission of Dr. Finkelstein's Expert Testimony & Causation

Under this argument, the defendant contended that Dr. Finkelstein's opinion failed to establish the amount of asbestos Britt inhaled over the years he visited defendant's facilities. In response, the plaintiff emphasized that Dr. Finkelstein testified that "in the aggregate" Britt's presence for "at least 150 days" of exposure to asbestos at defendant's facilities was a substantial contributing cause of his mesothelioma an ultimate death. Further, Dr. Finkelstein rejected the opinion that "any", "every" or "a single" exposure to airborne asbestos could be a contributing cause to a patient's mesothelioma, noting that the removal of asbestos-containing insulation of the kind present at the defendant's facilities would involve millions of asbestos fibers per cubic yard of insulation, and the cumulative exposure was significant in Britt's case. Therefore, the court found that Dr. Finkelstein's testimony, along with his

expertise and methodology, was sufficient to distinguish this case from a *Daubert* rejection. Thus, Dr. Finkelstein's opinion was properly admitted by the trial court.

Evidence of Nonparties as Alternate Exposures

As discussed above, defendant's also argued they should have been given the opportunity to put forth evidence that nonparties have exposed Britt to asbestos during his career and as a result, these nonparties may have also been a substantial contributing cause of his mesothelioma. Specifically, defendant argues that Britt testified to also working at facilities owned and operated by nonparties Mack Truck and Bekins Van Lines, and observed the presence of dust and maintenance performed on pipes and boiler rooms at those facilities. Without much discussion, the court quickly notes this argument fails as there was no evidence establishing that asbestos was present at the non-party facilities. Further, the plaintiff's pre-trial motion *in limine* was granted to exclude evidence as to the nonparties after defendant failed to provide the trial court with evidence that asbestos did in fact exist at these facilities.
Accordingly, the District Court of Appeal of Florida, Third District, affirmed the verdict and final judgment in all respects.

Read the full decision here.

Plaintiff's Medical Expert Permitted to Testify After Reversal of Judgment Barring Opinion

(California Court of Appeals, August 14, 2017)
Plaintiffs brought suit against several defendants including TRZ Realty, alleging their decedent developed colon cancer as a result of occupational exposure to asbestos. William Duty worked as a drywall taper for over 40 years. Before trial, TRZ filed a motion in limine challenging Dr. Revels Cayton's qualifications to testify as to the causal connection between colorectal cancer and Plaintiff's exposure to asbestos. After the trial court's hearing, the court disqualified Dr. Cayton. The plaintiffs conceded they could not prevail at trial without his testimony. The plaintiffs filed an appeal.

On appeal, the court reviewed the standard for expert qualifications. In sum, "the expert must be shown to have special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates. Additionally, a deciding factor is whether the expert's skill and experience would help the jury in ascertaining the truth. The trial court's disqualification of Dr. Cayton was made in part on his lack of background to "evaluate contradictory opinions" regarding asbestos exposure and colon cancer. Relying on *Brown*, the court noted that California courts have rightfully moved toward liberal views on qualifying medical experts. Nothing before the trial court reasonably illustrated why "an epidemiologist was required to explain and resolve the conflicting conclusions relevant in the studies." In fact, the plaintiff's expert had testified that he had approximately 30 years of experience reviewing epidemiological studies regarding asbestos. As for TRZ, the court noted that it understood Defendant disagreed with Dr. Cayton's finding. However, that was not a basis for disqualification. And although California courts act as a gatekeeper for improper expert testimony, they act cautiously in doing so according to the court. Having a contradictory opinion is not a basis for exclusion as it is not the job of the court to referee scientific debates.

TRZ argued that judgment should not be overturned because Dr. Cayton's opinions were not supported and were mere speculation. Specifically, TRZ took the position that Dr. Cayton extrapolated data from studies about cancer that had previously concluded were inadequate to prove causation. However, Dr. Cayton testified during cross exam why he found those studies to be reliable, i.e., he explained the latency period between two groups with respect to colon cancer and concluded that there was an increased occurrence of colon cancer in the 20 year plus group. Also, TRZ criticized Dr. Cayton's dismissal of colon cancer risk factors utilized by the Surgeon General. On the contrary, Dr. Cayton had testified that he did not agree with TRZ's counsel's representation on which rick factors the Surgeon General had identified as risk factors for colon cancer. Although TRZ's attacks may strike at the weight of Dr. Cayton's opinion, it did not render his opinions unsupported.

Consequently, judgment was reversed for further proceedings.

Read the full decision here.

Friction Defendants Granted Summary Judgment on the Issue of Causation

Supreme Court of New York, Nassau County, August 2, 2017

On August, 2, 2017, Nassau County Supreme Court Justice Julianne Capetola granted various defendants' motion to renew and re-argue the court's prior denial of the defendants' combined *Frye/*summary judgment motions as to the issue of causation. Upon renewal, the court granted summary judgment to the defendants.

By way of background, plaintiffs Giulio Novello and Rosaria Novello brought suit in the Nassau County Supreme Court seeking damages for personal injuries against various automotive-related defendants. The plaintiffs contended that Novello's lung cancer diagnosis was causally related to his occupational exposure to asbestos from brake work as an automotive technician. The plaintiffs sought to support the causal theory with expert reports from Drs. James Strauchen and Mark Ginsberg.

The defendants filed a *Frye* motion seeking to preclude the plaintiffs' expert witness causation opinions and, upon preclusion, for summary judgment. In their underlying motion, the defendants cited to, among other cases, *Parker v. Motor Oil Corporation,* 7 N.Y.3d 434 (2006). In *Parker,* the New York Court of Appeals determined that, in toxic tort cases, an expert opinion as to the element of causation must set forth (1) a plaintiff's exposure to a toxin, (2) that the toxin is capable of causing the particular injuries suffered and (3) plaintiff was exposed to sufficient levels of the toxin to cause such injuries. In *Novello*, the defendants argued that, under *Parker* and other similar New York case-law*,* the plaintiffs' experts' opinions were insufficient to satisfy this standard.

The court denied the motion, and determined that the paramount consideration is the fact that the plaintiffs' experts' opinions have the "**potential** to establish causation," which is a question of fact for the jury.

Notably, on the same day that Justice Capetola issued the decision, the New York Appellate Division, First Department, issued a decision in *Matter of New York City Asbestos Litig.,* 148 A.D.3d 223 (1st Dep't 2017) (Juni Decision). In *Juni,* the Appellate Division upheld the trial court's decision to vacate a verdict wherein plaintiff's experts failed to satisfy the standards of *Parker*. Among other issues, the experts in *Juni* failed to identify *some* quantification or means of assessing the amount, duration, and frequency of exposure in determining whether exposure to certain friction products was sufficient to be a contributing cause of the disease. *Id.*

The defendants in *Novello* filed a motion to re-argue and renew their prior motions. Argument was heard on June 1, 2017. Upon re-argument, citing the *Juni* Decision, the court granted the motion to reargue and renew, and upon further reconsideration, Justice Capetola determined the plaintiffs' experts failed to satisfy these causation standards. Accordingly, summary judgment was granted in favor of the defendants.

Read the full decision here.

Consideration of Decedent's Specific Exposure History Renders Testimony of Dr. Jacqueline Moline Reliable

U.S. District Court, New Jersey, August 4, 2017

Decedent Gerald Hoffeditz alleged asbestos exposure from automotive and heavy equipment repair on various vehicles, including large military trucks while working at the Letterkenny Army Depot. He subsequently passed away from mesothelioma. Various defendants moved to exclude the evidence and testimony put forth by the plaintiff's expert Dr. Jacqueline Moline. The court denied this motion.

For expert testimony to be admitted, the proffered witness must: (1) be qualified; (2) testify about matters requiring scientific, technical or specialized knowledge (reliability), and (3) assist the trier of fact. To be qualified, the witness must have specialized expertise. To be reliable, the process or technique the expert used in formulating his/her opinion must be based on the methods and procedures of science. Finally, the testimony must establish a valid scientific connection to the pertinent inquiry.

First, Dr. Moline was qualified. Second, after observing Dr. Moline in a Daubert hearing, the court concluded that her methodology was reliable and would assist the tier of fact. She considered a variety of methodologies established in the literature for determining whether exposure to a chemical compound caused a particular disease. In answering the question of whether the patient was exposed to a dose shown to cause the disease, the defendants argued that Dr. Moline relied upon an impermissible "each and every breath" theory of causation, which had been held insufficient to establish substantial factor causation under Pennsylvania law. However, the court found that Dr. Moline relied upon the decedent's specific exposure history, not the "each and every breath" theory, and therefore her testimony was sufficiently reliable. Dr. Moline considered the decedent's answers to interrogatories, deposition testimony, and

medical records to determine his exposure, and the amount/type of work performed with different products. She compared this work to studies considering individuals working in similar capacities. This was precisely the type of analysis that at least one defendant had suggested should be performed. Further, "to the extent Defendants argue Dr. Moline's testimony should not be admitted because she did not quantify Mr. Hoffeditz's exposure from each Defendant's products, they have failed to articulate how this indicates a lack of reliability or fit."

Read the full decision here.

Each and Every Exposure Theory Insufficient to Prove Specific Causation in South Carolina Federal Court

(U.S. District Court for the District of South Carolina, July 21, 2017)

This decision addresses a similar issue from two different cases and therefore was decided within the same order. Both sets of plaintiffs offered the opinions of Carlos Bedrossian, MD to provide evidence of specific causation. For a brief factual background, plaintiff John E. Haskins served in the U.S. Navy as a fireman aboard the USS Coney. Haskins was diagnosed with mesothelioma in November of 2014 allegedly caused by his cumulative exposure to asbestos from working with and around asbestos-containing products manufactured or distributed by the defendants. Plaintiff James Willson Chesher served as a machinist mate and a commissioned officer in the U.S. Navy and conducted or oversaw maintenance and repair work on various types of asbestos-containing equipment, including valves and de-aerating feed tanks. Chesher was also diagnosed with mesothelioma allegedly caused by his exposure to equipment manufactured by the defendants.

Bedrossian's opinions in both cases are essentially the same. In *Haskins*, Bedrossian concludes that the "total and cumulative exposure to asbestos, from any and all products, containing any and all fiber types, was a significant contributing factor to Haskin's risk of premature death from complications of his mesothelioma". In *Chesher,* Bedrossian concludes that "each of the defendants' products which contained asbestos added to the total cumulative dose of Chesher's asbestos exposure, and therefore, constituted the contributing factor to the development of his mesothelioma, and his risk of premature death from complications from this lethal form of occupational malignancy." The defendants filed a motion *in limine* to preclude Bedrossian's opinion as to specific causation and argue that to the extent that any specific causation opinions are offered by Bedrossian, they were necessarily based on the "every exposure theory" of causation and inadmissible under Rule 403 and Rule 702. The plaintiffs disputed this characterization of "each and every exposure" and contends that Bedrossian would simply opine that "low dose exposure to asbestos can cause mesothelioma." The plaintiff further argues that Bedrossian does not claim that every exposure contributes to the cumulative dose in a way that can be considered causative. Instead, the plaintiffs claim that Bedrossian only considers exposures to be causative if they reach "non-trivial," "above background," or "occupational" levels. However, Bedrossian never defines what level of exposure he considers significant and openly admits that he did not even need to know Haskins or Chesher's actual level of exposure to the defendants' products in order to render his opinions. Therefore, the decision outlines that in Bedrossian's view, whenever the total cumulative dose results in mesothelioma, every "occupational" exposure should be considered causative, no matter how small.

In review of these motions, the United States District Court, South Carolina, Charleston Division, relies upon *Lindstrom v. A-C Prod. Liab. Trust,* 424 F.3d 488, 492 (6th Cir. 2005), and finds that regardless of whether the "each and every exposure theory is sound science, it is inconsistent with the law. In a products liability action under maritime law, the plaintiff must show "that (1) he was exposed to the defendant's product, and (2) the product was a substantial factor in causing the injury he suffered." This analysis must be conducted on a defendant-by-defendant basis. Minimal exposure' to a defendant's product is insufficient." Id.

The court also offers that perhaps there is some level of exposure at which substantial causation may be presumed, regardless of the nature and extent of the plaintiff's other exposures. But even if a plaintiff may show substantial causation by establishing some particular level of exposure in a vacuum, it is clear that this threshold level cannot be defined as the level of exposure that may cause mesothelioma. This would render the substantial causation rule meaningless, as any level of exposure may cause mesothelioma. Therefore, because Bedrossian's opinions are premised on his conclusion that the plaintiffs' exposures to asbestos from the defendants' products could have independently caused their mesothelioma, his opinions cannot be used to support a finding of substantial causation. Thus, the probative value of Bedrossian's testimony is outweighed by its tendency to confuse and mislead the jury, and it must be excluded under Rule 403.

The defendants' motions to the extent they seek to exclude Bedrossian's testimony was granted.

Read the full decision here.

Plaintiffs' Daubert Challenge Denied as Expert Disclaims Causation Expertise

(United States District Court, D. Maryland, July 17, 2017)

Plaintiffs filed their Daubert challenge seeking exclusion of Georgia Pacific's Certified Industrial Hygienist, Donald Marano. Plaintiff argued that Mr. Marano would offer qualitative and quantitative exposures of Plaintiff along with the *risk and causation* of Mr. Arbogast's mesothelioma. Georgia Pacific countered with the position that Mr. Marano has "repeatedly disclaimed any expertise on causation and has confined his opinion to explaining the risk assessments performed by various agencies and organizations and offering his risk assessment opinion based on the analysis that his profession is trained to provide."

After argument, the Court agreed with Georgia Pacific and denied the motion finding that Mr. Marano's opinion met all the criteria of Federal Rule 702.

Read the full decision here.

Exclusion of Plaintiffs' Causation Experts Leads to Granting of Summary Judgment

(U.S. District Court for the District of Maryland, July 17, 2017)

Plaintiffs filed suit against Georgia Pacific ("GP") and Union Carbide Corporation ("UCC") alleging Mr. Rockman's peritoneal mesothelioma was caused by exposure to asbestos for which both Defendants were responsible. Specifically, Mr. Rockman claimed "bystander" exposure to GP's Ready Mix joint compound that contained UCC's Calidria *chrysotile* asbestos during residential renovations in 1965, 1973 and 1976. Plaintiff stated that he was exposed during his time living in a Brooklyn apartment when a ceiling was repaired in 1965, again in 1973 during wall repair in Baltimore, MD and finally during wall repair at a different Baltimore, MD residence in 1976.

The case was removed from the Circuit Court for Baltimore City by UCC. GP and UCC filed motions for summary judgment. GP also filed a motion to exclude causation opinions of Drs. Frank, Brody and Abraham. UCC filed a Daubert challenge regarding Calidria chrysotile or that "Each and Every" exposure to an asbestos product contributes to the development of peritoneal mesothelioma. At hearing, Plaintiffs conceded that they could not survive summary judgment should the court exclude their experts.

Drs. Frank and Abraham both opined that Plaintiff's peritoneal mesothelioma was caused by the alleged exposure to chrysotile asbestos found in GP's joint compound. Although Dr. Brody did not offer specific causation, he believed that "each and every" exposure cumulates and is therefore a cause of disease. The Court began its analysis with the standard to exclude expert testimony under Federal Rule 702 which provides: 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 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 the expert has reliably applied the principles and methods to the facts of the case. The Court continued with the standard for summary judgment which provides that a court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The Court quickly honed in on Drs. Frank and Abraham's reliance on several studies regarding high levels of work exposure to asbestos. However, Plaintiff had testified that he did not work with the joint compound but rather was a bystander and present only part of the time during the work. Drs. Frank and Abraham were not able to quantify Plaintiff's exposure. Moreover, the experts had no citation to studies linking even small doses of *chrysotile* asbestos to the development of *peritoneal* mesothelioma. The Court also noted that chrysotile is a less potent fiber type of asbestos. The Court was troubled by what is characterized as "conflated data on *pleural* mesothelioma and amphibole asbestos with data on *peritoneal* mesothelioma and chrysotile asbestos. Drs. Frank and Abraham acknowledged that that peritoneal mesothelioma is usually associated with vast exposure over pleural mesothelioma. The Court also noted that the *Yates* opinion from a different jurisdiction excluded an expert where his causation opinion did not consider different types of asbestos. Like the expert in *Yates*, Drs. Frank and Abraham have not supported their causation findings on "sufficient facts" or "data" that is generally accepted in the scientific community. Accordingly, GP and UCC's motions to exclude expert testimony were granted with respect to Drs. Frank and Abraham.

The Court also granted Defendants' motions to exclude "each and every exposure" theory. All three Plaintiffs' expert agreed that a Plaintiff's cumulative exposure from each and every exposure is to be considered as a cause of the disease. The Court began its discussion noting that courts have repeatedly rejected the each and every exposure or cumulative theory, including those of Dr. Brody. Plaintiffs countered that several state courts have accepted the each

and every exposure theory. However, those decisions were not based on the federal Daubert standard but rather under the state Frye-Reed test according to the Court. The Court therefore granted the motion to exclude the each and every exposure theory.

At this point, only the strict liability, negligence and loss of consortium claims remained against GP and UCC. Relying on its decision from the *Sherin* case, the issue of substantial factor is fact specific. Here, Mr. Rockman was a bystander and not a user of the product. Medical causation is to be considered within the standard for substantial factor according to the Court. Here, Plaintiffs' experts have already been excluded. Finally, the Court stated that GP was under no duty to warn for pre 1972 exposures as it had no way to warn a bystander.
Consequently, Plaintiffs' experts were excluded and summary judgment was entered in favor of GP and UCC.

Read the full decision here.

NYCAL Court Denies Motion in Limine to Preclude Plaintiff's Causation Experts

(Supreme Court of New York, New York County, April 14, 2017)

The court issued further rulings in a case previously reported in Asbestos Case Tracker on April 12, 2017. This case involved plaintiff Frederick Evans' alleged exposure to asbestos-containing dust from his work as an HVAC mechanic from 1955-59. Although the defendants submitted a joint omnibus motion in limine, the only defendant remaining at trial was Burnham LLC. Here, the motion in limine to exclude the causation opinions of the plaintiffs' experts Dr. Carl Brodkin and Dr. John Maddox was denied.

Burnham argued the plaintiffs' causation experts would offer a scientifically unsupportable causation opinion based upon the "each and every exposure" theory. Burnham cited to case law finding that "[i]t is well-established 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 the plaintiff was exposed to sufficient levels of the toxin to cause illness (specific causation)." Burnham asserted that even if the plaintiffs' experts could establish general causation (that asbestos can cause mesothelioma), they cannot establish specific causation – that Mr. Evans was exposed to enough asbestos from his work around Burnham products to have substantially contributed to causing his disease.

The plaintiffs argued that in forming his opinion, Dr. Brodkin performed a dose analysis and relied upon various studies, Mr. Evans' exposure history, and other items. Regarding Dr. Maddox, the plaintiff pointed the court to federal litigation wherein various courts accepted his testimony as satisfying *Daubert*. The plaintiffs further cited to other case law holding that precise quantification was not necessary.

In denying the motion, the court stated that Burnham failed to demonstrate that Dr. Brodkin's opinion was insufficient; Dr. Brodkin quantified the exposure itself, the percentage of time spent with the products, estimated the dose, and identified studies relied upon in doing so. Presumably both Dr. Brodkin and Dr. Maddox would expand on their reports. Precedent did not compel a different result.

While other experts in prior cases were precluded from testifying, the court noted that in those cases, the product at issue was still on the market and capable of being tested. Thus, "it is 'inappropriate to set an insurmountable standard that would effectively deprive toxic tort plaintiffs of their day in court.' The defendant's emphasis on quantification, and their complaints that the plaintiffs' experts do not quantify asbestos release by sampling, collecting, and evaluating the air ignores the reality that the asbestos-containing product at issue … is almost always no longer on the market or otherwise available, and therefore, is not capable of being tested." To read precedent in the way Burnham suggested would forestall recovery in nearly all asbestos cases and would be the death knell to asbestos exposure litigation.

Read the full decision here.

Daubert Challenges Result in Experts Being Allowed to Testify Regarding General Causation; Not Specific Causation

(U.S. District Court for the Eastern District of Louisiana, March 6, 2017)

In this federal court case, it was alleged that the plaintiff's decedent was exposed to asbestos while serving in various job duties while in the U.S. Navy during the 1960s. The plaintiff brought two Daubert motions seeking to preclude the defendants' experts, Drs Michael Graham and Mark Taragin, from testifying. Dr. Graham is a forensic pathologist and Dr. Taragin is an epidemiologist. The court granted in part and denied in part the plaintiff's motions.

The court would allow each expert to provide general causation testimony regarding the nature of asbestos and the effects of its exposure. However, the court would not allow the experts to provide specific causation testimony that decedent's mesothelioma was not caused by the defendants' products. As the court noted in its decision: "Suffice it to say, in the realm of asbestos exposure, the percentages alone simply do not bear out specific causation testimony one way or the other. *See Yates v. Ford Motor Co.,* 113 F. Supp. 3d 841, 847 (E.D. N.C. 2015) ("[I]ncreasing the likelihood of disease is a different matter than actually causing such disease."). The analytical gap is too great. Accordingly, Dr. Graham may not offer the specific causation opinion that a defendant's products did not cause or contribute to causing Mr. Bell's mesothelioma. The plaintiffs' motion is granted as to this issue."

In a separate decision, the court also denied the plaintiff's motion for reconsideration of the court precluding their experts, Drs Kraus, Kradin and Mr. Parker, from offering specific causation opinions. As the court held: "In sum, Dr. Kraus's, Dr. Kradin's, and Mr. Parker's opinions on specific causation are unreliable and must be excluded under Rule 702. However, the plaintiffs' experts may testify — subject to a potential Rule 403 objection at trial — regarding Mr. Bell's mesothelioma and issues of general causation. Likewise, provided that any Rule 403 objections are overcome, the experts may also respond to defendants' argument that certain exposures were *de minimis* by noting that certain studies suggest that specific causation cannot be ruled out."

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

Kentucky Appellate Court Rejects "Any Exposure" Causation Theory

(U.S. Court of Appeals for the Sixth Circuit, January 10, 2017)

In September of 2012, William Stallings filed suit in Kentucky state court against Georgia Pacific and other manufacturers of the asbestos containing products he had been exposed to decades earlier, seeking punitive damages under theories of strict liability and negligence. Specifically, Stallings was diagnosed with mesothelioma allegedly caused by his four years of Naval Service, where he helped operate and maintain boilers aboard the USS Waller. After leaving the Navy, Stallings worked as a drywall finisher, where he alleged exposure from mixing and installing drywall. The case was later removed to federal district court, and proceeded there until September 2013, when Stallings passed away from complications due to his mesothelioma. Carol Lee Stallings, as the surviving spouse and as executrix of the estate (the plaintiff), filed an amended complaint and added a wrongful death claim.

The remaining defendants, including Georgia-Pacific, moved for summary judgment arguing the plaintiff failed to meet the causation standard in Kentucky, which the district court granted. As to the claims against Georgia-Pacific, the court found that Stallings had failed to establish that the company's products were a substantial factor in bringing about Stallings' mesothelioma, as required for a finding of causation under Kentucky common law. Specifically, the court noted, in order to survive summary judgment, the plaintiff would have had to provide evidence that the company's products were probably, rather than possibly, a ***substantial cause*** of Stallings' mesothelioma. However, the plaintiff's medical experts could only testify "that ***any*** exposure to asbestos qualifies as a ***substantial*** exposure," offering no more precise estimate of how much of that exposure was due specifically to Georgia-Pacific's products. Accordingly, as Kentucky does not follow the "any exposure" theory of causation, the district court dismissed the claims against Georgia Pacific. The plaintiff appealed.

In review of this appeal, the United States Court of Appeals of the Sixth Circuit affirmed the district court's judgment to grant defendants motion for summary judgment. This Court of Appeals reasoned that because prior precedent had already rejected the type of evidence on which Stallings relies as simply too insubstantial to satisfy that standard, Stallings cannot show that Georgia-Pacific was legally responsible for Mr. Stallings' injury. For example, this type of limited testimony — the only that the plaintiff can cite on behalf of the claim that Georgia Pacific's products were legally responsible for her Stallings' mesothelioma—is too spare to satisfy Kentucky's ***substantial factor test***, especially given the evidence of Stallings' considerable daily exposure to asbestos aboard the USS Waller during his Naval Service. Accordingly, the court found the plaintiff failed to present evidence showing that Georgia Pacific's products were a probable, as opposed to a merely possible, cause of Stallings' disease. Under Kentucky law, as the Court of Appeals has understood it, that failure was not enough to make a reasonable inference of causation. Georgia-Pacific was therefore entitled to summary judgment.

Read the full decision here.

Federal Officer Jurisdiction Decisions

Insulation Used On Nuclear Prototype "Ordinary Consumer Product" and Not Subject to Military Contractor Defense

(U.S. District Court, Central District of California, August 21, 2017)

Plaintiffs Wayne and Tina Yocum filed a renewed motion to remand which defendant CBS Corporation (Westinghouse) opposed. Wayne Yocum was diagnosed with mesothelioma and died on February 5, 2017. Without oral argument, the court granted the plaintiffs' renewed motion to remand.

Wayne Yocum served in the Navy from 1965-75. Westinghouse supplied the asbestos-containing insulation that was used in his presence during his naval training on the A1W, a working prototype of a nuclear propulsion system. The plaintiffs originally filed this action in California, and only alleged strict products liability/design defect and loss of consortium against Westinghouse. Four days after Mr. Yocum's death, Westinghouse filed for removal based on federal officer jurisdiction. The plaintiff filed a motion to remand, which the court denied, based upon untimely procedural attacks and proper subject matter jurisdiction. At a June 2017 scheduling conference, the court invited the plaintiff to file a renewed motion because it was reconsidering the issue of whether Westinghouse raised a colorable military contractor defense.

Westinghouse asserted the military/contractor defense, which immunized military contractors from liability 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. In such situations, the government must have been sufficiently involved in the design of the defective feature or defective warnings so it can be said that the contractor is acting under the color of his duties as an agent of a federal officer. However, the military contractor defense was only available when the contractor produced "military equipment;" it did not apply to an ordinary consumer product purchased by the armed forces. The Ninth Circuit held: "Where the goods ordered by the military are those readily available in substantially similar form to commercial users, the military contractor defense does not apply."

Westinghouse argued that the object at issue should be the A1W as a whole, not just the insulation. "This evidence is inapposite to the crucial question: was the insulation supplied by Westinghouse 'developed on the basis of involved judgments made by the military,' or was it 'an ordinary consumer product purchased by the armed forces'? … Westinghouse does not dispute that the insulation it supplied to the A1W was a 'commercially-available product.'" Further, the fact that the insulation met the military's specifications did not by itself make it "military equipment."

Read the full decision here.

Federal Court Defines "Other Paper" in Removal Statute § 1446

(U.S. District Court for the Middle District of Louisiana, June 21, 2017)

The plaintiff filed a petition for damages in the 18th Judicial District Court for the Parish of Iberville on February 23, 2017, and named Avondale, among others, as a defendant. The plaintiff alleged he contracted mesothelioma during his employment with Avondale caused by "dangerously high levels of toxic substances, including asbestos and asbestos containing products, in the normal course of his work." Defendant Avondale filed a notice of removal to the United States District Court of Louisiana on April 28, 2017 under the federal officer removal statute, *28 U.S.C. § 1442*. The plaintiff opposed and argued that Avondale's notice of removal was filed untimely.

The procedure for removal, pursuant to *28 U.S.C. § 1446*, states in relevant part: "if the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable." Courts have held that *§ 1446(b)(3)* provides that "where the timeliness of a federal officer's removal is at issue, *§ 1442's* liberal interpretation is extended to *§ 1446*." *See Durham v. Lockheed Martin Corp.*, 445 F.3d 1247, 1252 (9th Cir. 2006) (holding "that a federal officer defendant's thirty days to remove commence when the plaintiff discloses sufficient facts for federal officer removal, even if the officer was previously aware of a different basis for removal").

The key issue in this case was the interpretation of the phrase "within thirty days after receipt by the defendant . . . of other paper." Here, Avondale removed the case within thirty days of receiving the transcript from the plaintiff's deposition. However, this was outside the 30-day window of when the deposition actually took place. Therefore, the

central dispute is when does the 30-day trigger commence — the day of the deposition or the day defendant receives the transcript?

The United States District Court, Middle District of Louisiana found that *§ 1446(b)(3)* and was ambiguous to this question and controlling case law was split. Thus, the court looked to persuasive authority from other circuit courts. Here, the court found more persuasive those cases holding that the 30-day removal period commences to run from the date of the deposition, not the date the transcript is received. This conclusion was bolstered by the majority of courts considering this question, including the Tenth, Third, Ninth, and Sixth Circuits. The main premise is: the day of the deposition is the day where defendant gained actual notice that the case was removable. This court found that to be consistent with the policies underlying *§ 1446* and that defendants are not permitted to 'sit idly' while the statutory 30–day removal period runs and 'squander both judicial resources and the resources of his adversary. [Citation Omitted].

Accordingly, after considering these cases from other circuits, the court found that Avondale was required to remove within thirty days of the plaintiff's deposition. As Avondale failed to do so, the court found the removal was untimely and the suit should be remanded to state court.

Read the full decision here.

Timely Removed Take-Home Exposure Case Remanded for Failure to Establish Colorable Federal Defense

(U.S. District Court for the Eastern District of Louisiana, June 19, 2017)

The plaintiffs filed suit against several defendants including Avondale alleging that their decedent, Ms. Blouin, contracted mesothelioma after washing the laundry of her husband's work clothes. Victor Blouin worked as an electrician for Avondale onboard two government vessels from April 1972 until August 1972. The plaintiffs' claims were brought in negligence and not for strict liability. Avondale removed the case to federal court on March 28, 2017, 26 days after receiving a copy of the deposition transcript. The plaintiffs' moved to remand.

The plaintiffs took the position that the removal was untimely as it was filed more than 30 days from the deposition of Victor Blouin which occurred on February 17 and 20, 2017. The plaintiffs contended that the removal should have been filed within 30 days *of the deposition* rather than within 30 days of having received the transcript. The court reviewed the statute which provided for removal when "if the case stated by the initial pleading is not removable, a notice of removal may be filed within 30 days after receipt by the defendant, through service or otherwise, of a copy of an **amended pleading, motion order, or other paper** from which it may be first ascertained that the case is one which is or has become removable." Reviewing the *Huffman* case, the court noted that it is the deposition testimony itself that started the countdown for removal. Further, Avondale was present at the deposition in February. Accordingly, Avondale was on notice of the removability of the case the day of the deposition. However, the court pointed out that § 1446 (b)(3) does not say "writing" but rather uses the phrase "other paper." Another case *S.W.S. Erectors*, found that a deposition transcript establishes "other paper." The *Huffman* case did not explore whether a transcript as an "other paper" would reset the clock for a second removal. As that particular issue had not been decided, the court found the removal timely.

The court then turned to the merits of removal. Avondale argued that it was required by federal contract to use asbestos containing products during the building of the ships. On the other hand, the plaintiffs took the position that the defendant still failed to warn of the dangers of asbestos. In short, the plaintiffs argued that Avondale could not assert the federal defense because nothing illustrated that the federal government controlled the safety measures Avondale could have taken with respect to its asbestos products. Additionally, the plaintiffs argued that it was not pursuing a strict liability claim but rather a claim in negligence. According to the plaintiffs, a huge distinction exists in strict liability and negligent failure to warn claims when "a contractor seeks to remove a case and avail itself to the contractor immunity defense." The court noted that even where a defendant can show it operated under the terms of a federal officer's direction, removal is not proper unless it can also show "a causal connection between the defendant's actions under color of a federal office and the plaintiff's claims." Relying on several past decisions, the court noted that Avondale cannot show the required nexus between the federal officer's direction and the alleged actions Avondale took that caused injury. As to negligence claims, case law had previously held that removal was not proper when a defendant had free range on "discretionary" issues outside of federal interference at the shipyard.

Avondale argued that the nexus requirement fundamentally changed when Congress amended § 1442 (a)(1) to expand the removability of cases. According to Avondale, the cases the court relied upon were "pre-amendment" cases. The court was not persuaded. The *Zeringue* case was on point according to the court. That case acknowledged the expansion of removability but expressly did not attempt to change the law with respect to

negligence claims sounded in failure to warn. The court was not persuaded by Avondale's arguments and noted that without a federal defense, jurisdiction is nonexistent under Article III of the constitution. And clearly, the Congressional amendments did not affect Article III.

Accordingly, the case was remanded to state court.

Read the full decision here.

Abandonment of Claims Alleging Asbestos Exposure at Government Facilities Eliminated Federal Jurisdiction

(U.S. District Court for the Southern District of New York, May 31, 2017)

Defendant Crane Co. appealed the remand ordered by the district court to New York State Court. Crane had removed based upon the federal officer removal statute. The appellate court affirmed the remand without a summary of the underlying facts.

First, Crane argued remand was erroneous because the federal courts had original subject matter jurisdiction. The district court had concluded that the plaintiffs had abandoned any claims arising from asbestos exposure occurring at a government facility; thus, the basis on which this action was originally removed was extinguished. Crane argued that the claims giving rise to original jurisdiction must be formally dismissed, not abandoned, for a properly removed case to be remanded to state court. However, the case law was contrary to this argument. Clearly, the federal claims were abandoned, and the district court explicitly recognized that the claims were no longer in the case. "Hence, federal question jurisdiction no longer existed." Crane also failed to establish diversity jurisdiction, as this must exist at the time of filing the complaint and at the time of removal. At the time of filing, diversity jurisdiction did not exist due to the presence of one New York defendant.

Second, Crane argued that even if the court lacked original jurisdiction, the district court abused its discretion in declining to exercise supplemental jurisdiction. Under 28 U.S.C. § 1367(a): "district courts shall have supplemental jurisdiction over state-law claims 'that are so related to claims in the action within [the court's] original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.'" Further, section 1367(c) provides that: "a district court may decline to exercise supplemental jurisdiction if '(1) the claim raises a novel or complex issue of State law, (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction, (3) the district court has dismissed all claims over which it has original jurisdiction, or (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.'" Thus district courts may refuse to exercise supplemental jurisdiction on any one of these four grounds. Here, the district court declined to exercise supplemental jurisdiction because plaintiffs abandoned their claims giving rise to original jurisdiction. Case law held that district courts abuse their discretion when they retain jurisdiction over state-law claims which raise unsettled questions of law after dismissal of original-jurisdiction claims.

Read the full decision here.

Maritime/Admiralty Law Decisions

Prior Settlement that Included Future Claims Not Enough to Grant Motion for Summary Judgment

(Supreme Court of New York, Appellate Division, August 29, 2017)

Plaintiffs Mason South and his wife filed suit under the Jones Act against several defendants, including Texaco, alleging his mesothelioma developed as a result of exposure to asbestos containing products for which defendants were responsible. Mr. South served as a merchant marine for 37 years. Texaco moved for summary judgment arguing that suit was precluded by a prior release signed by the plaintiff in an earlier lawsuit from 1997. Specifically, Mr. South had released Texaco from "all bodily and/or personal injuries, sickness or death" from asbestos exposure including "the long term effects of exposure." The plaintiff opposed Texaco's motion for summary judgment arguing that the settlement did not bar his claim for mesothelioma pursuant to a section of the Federal Employers' Liability ACT (FELA). Section 5 of FELA requires strict scrutiny of release according to the plaintiff. The release had no effect on the instant claim since the plaintiff did not have mesothelioma at the time he released Texaco from his 1997 claim. Relying on two federal cases, the trial court denied the motion. Texaco appealed.

On appeal, the court analyzed the two cases, noting the split between federal circuits for the standard. In *Babbitt*, the court found a release valid when it reflects 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 injuries known or unknown by him." As for the *Wicker* case, the court concluded that a plaintiff was "specifically aware of the known risks" and prohibited boilerplate language from being enforceable. In its analysis, the court pointed out that Texaco bore the burden as this was a case in brought in admiralty. Applying the *Wicker* standard, the court found that the release would be not be applicable because it did not mention the plaintiff was waiving claims for mesothelioma. The court went on to "tease" out the plaintiff's intent when he signed. The 1997 complaint was vague as to whether the plaintiff suffered from an asbestos related disease. Rather, the 1997 complaint made general exposure allegations. Therefore, the chance of the plaintiff actually contracting an asbestos related disease was not contemplated by him when the release was signed. Accordingly, the denial of the motion was affirmed.

However, a strong dissent followed the opinion. A dissent was filed arguing that the Texaco had met its burden. Here, the language of the release illustrated that the plaintiff understood that exposure "could result in future injuries and diagnoses." Additionally, the dissent noted that the 1997 settlement served as a compromise in a case where the adversaries were represented by counsel.

Read the full decision here.

Pain and Suffering Damages Found as Pecuniary Under Maritime Law; Summary Judgment Granted in Part and Denied in Part

(U.S. District Court for the Eastern District of Louisiana, March 6, 2017)

The defendants moved for summary judgment arguing that the plaintiff, John Bell, lacked standing to pursue a wrongful death or survival action under the Death on the High Seas Act (DOHSA). Specifically, the defendants relied on the language in DOHSA, which stated that "when death of an individual is caused by wrongful act, neglect, or default occurring on the high seas beyond 3 nautical miles from the shore of the United States, *the personal representative* of the decedent may bring a civil action" and the holding in *Dooley* which barred survival actions under DOHSA. The plaintiffs argued that maritime law applied and conceded that under maritime law the wrongful death claim must be brought by the executrix of the estate Vickie Campos. The plaintiffs had added John Bell as a plaintiff to assert exposures that took place in Idaho. The parties contested whether or not a survival action could be sustained for exposures that occurred on ships. The court agreed with the plaintiff that maritime law applies as the evidence suggested exposures took place both within territorial waters and on the high seas. Accordingly, the motion as to the survival claim for exposure on ships was denied.

The defendants also moved for summary judgment as to claims asserted by Vickie Campos in her personal capacity and not as the personal representative. As she was not the decedent's spouse the court agreed and granted the defendants' summary judgment as to her personal claims.

The defendants also moved for summary judgment on damages under Bell's wrongful death claim as he was not a "dependent relative" of William Bell. Although this argument was made in the context of DOHSA, the court analyzed

the argument under maritime law since DOHSA did not apply. As a roommate of the decedent, the plaintiff needed assisted living after his roommate passed. The plaintiff claimed recovery for the increase in cost of his new living arrangements as well as pain and suffering of the decedent. The court quickly noted that as a seaman, nonpecuniary losses are not recoverable on the wrongful death claim. According to the court, the plaintiff could not recover nonpecuniary damages for the wrongful death claim. This part of the summary judgment motion was granted. However, there was sufficient evidence in the record to allow pecuniary damages to go forward on the wrongful death claim.

Finally, the defendants moved for summary judgment for all nonpecuniary damages including pain and suffering. The court noted that it had already found only pecuniary damages available in the wrongful death claim. It also noted that nonpecuniary damages are not available in survival actions. However, relying on the Jones Act the court found that claims for pain and suffering are *pecuniary* under the Jones Act. Accordingly, the pain and suffering damages under the survival action may be recoverable.

Read the full decision here.

"Discovery Rule" Applied for Plaintiffs' Claim to Survive Two-Year Statue of Limitations

(U.S. District Court for the Eastern District of Pennsylvania, March 2, 2017)

The plaintiffs asserted that the decedent, Joseph Conneen, was exposed to asbestos while working as a pipefitter and plumber from 1962-80 at the Philadelphia Naval Shipyard and Rohm and Haas. The decedent died of lung cancer. The complaint was filed on January 20, 2015. In March 2015, the case was removed to the U.S. District Court for the Eastern District of Pennsylvania as part of MDL-875. Defendant Goulds moved for summary judgment on the basis of Pennsylvania's two-year statute of limitations. The court denied this motion.

The plaintiffs provided an affidavit summarizing the events surrounding Mr. Conneen's diagnosis and discovery of asbestos as a potential cause of his lung cancer. Although the decedent was diagnosed in December 2012, he did not discover asbestos as a potential cause until February 12, 2013. Although discovery was allowed on the statute of limitations issue, including a potential deposition of Mr. Conneen, he was never deposed and the defendants relied exclusively on his December 2012 medical records.

At the outset the court noted that the plaintiffs alleged both land-based (state law applied) and on-ship (maritime law applied) exposures. The outcome was the same, regardless of whether state or maritime law applied.

Under Pennsylvania law, the statute of limitations for an asbestos-related injury was generally two years from the date on which a claim may be brought. Pennsylvania employed the "discovery rule" in cases where an injured party was unable to know of both (1) the fact of injury and (2) the cause of that injury. This rule may apply in cases of asbestos-related disease, where there is not an immediate and obvious causal link between a diagnosis and exposure to asbestos. Pennsylvania also allowed a tolling of the statute through the "doctrine of fraudulent concealment," even in situations of unintentional deception. Under both rules, the plaintiffs must have undertaken "reasonable diligence" in timely bringing an action. The court analyzed various Pennsylvania Supreme Court cases in which the court analyzed what constituted "reasonable diligence."

Under maritime law, the statute of limitations was three years after the cause of action arose. Causes of action accrued when a plaintiff had a reasonable opportunity to discover his injury, its cause, and the link between the two. The defendant argued the plaintiffs' claims were barred because medical records supported that Mr. Conneen knew of his lung cancer diagnosis and had discussed with his doctors his asbestos exposures. Further, Mr. Conneen was not diligent in attempting to discover the cause of his lung cancer; the fact that he never smoked should have heightened his inquiry. The plaintiffs argued Mr. Conneen was reasonably diligent in inquiring about the cause of his lung cancer since he determined within two months of his diagnosis that asbestos may have been a cause. Further, none of his doctors advised him that asbestos may have been a cause. In support, the plaintiff provided an affidavit of Mr. Conneen stating that he first learned asbestos may have been a cause during a February 12, 2013 meeting with his doctor, in which he inquired about the cause.

The court found that under maritime law, defendant's motion should be denied because the statute of limitation was three years. Under Pennsylvania law, the motion is also denied. First, although defendants rely on one medical record from December 18, 2012, mentioning a history of asbestos exposure, there was no indication that this document was ever provided to Mr. Conneen, or that this issue was ever discussed with Mr. Conneen. A subsequent letter from one of his doctors denied any worrisome asbestos exposures. Five separate physicians involved in Mr.

Conneen's care were aware of his asbestos exposure, but according to Mr. Conneen, none of them informed him that asbestos may be a cause until February 12, 2013.

Second, the court could not say that Mr. Conneen did not act with reasonable diligence. Contrary to previous cases analyzed by Pennsylvania courts on this issue, it took less than two months from the date of his diagnosis for Mr. Conneen to discover the potential link between his lung cancer and asbestos exposures. Further, the court could not conclude that the doctrine of fraudulent concealment applied to toll the statute, as there was no evidence that decedent's doctors acted as agents for defendants to unintentionally deceive Mr. Conneen by concealing his potential claim.

Read the full decision here.

Magistrate Judge Recommends Granting Summary Judgment to Four Defendants Due to Lack of Evidence

(U.S. District Court for the District of Delaware, February 15, 2017)

A report and recommendation was made regarding four summary judgment motions filed by defendants Gardner Denver, Flowserve, Atwood & Morrill Company, and Nash Engineering. The plaintiffs did not respond to any of the motions for summary judgment. The magistrate judge recommended granting all four motions.

The plaintiffs originally filed in Delaware state court, alleging that Icom Henry Evans developed mesothelioma due to asbestos exposure while a fireman and boiler tender with the U.S. Navy from 1957-1967. Foster Wheeler removed to federal court. The only fact witness deposed was Mr. Evans, who testified he believed he was exposed to asbestos gaskets and refractory brick on the USS Kearsarge and USS John A. Bole. He did not identify any products made by Gardner Denver, Flowserve (Edward Valves), Atwood, or Nash.

The parties agreed that maritime law applied to all Naval/sea based claims. To establish causation in an asbestos claim under maritime law, a plaintiff must show that: (1) he was exposed to the defendant's product, and (2) the product was a substantial factor in causing the injury he suffered, and (3) the defendant manufactured or distributed the asbestos-containing product to which exposure is alleged. "A plaintiff may rely upon direct evidence…or circumstantial evidence [to] support an inference that there was exposure to the defendant's product for some length of time…a mere showing that defendant's product was present somewhere at plaintiff's place of work is insufficient." In this case, since the plaintiffs did not produce any evidence tending to establish exposure to Gardner Denver, Flowserve, Atwood, and Nash products, the plaintiffs failed to meet the substantial factor test. The magistrate judge recommended granting summary judgment.

Read the full decision here.

No Error in Recommendation of Summary Judgment Where Plaintiffs Failed to Establish Causation

(U.S. District Court for the District of Delaware, January 9, 2017)

Summary Judgment was recommended by the magistrate for the plaintiffs' failure to establish causation in this case. The plaintiff appealed and contended that his asbestos related disease was a result of exposure to asbestos from Foster Wheeler boilers while working onboard the USS Gridley.

The court noted that the standard of review of a magistrate's report and recommendation is de novo. In this case, no party objected to the application of maritime law. Accordingly, the plaintiff had the burden to show: 1) The plaintiff was exposed to products made by Foster Wheeler 2) Foster Wheeler made or distributed the product 3) the product was a substantial factor in causing the plaintiff's injuries. The court stated that direct and circumstantial evidence is permitted to establish substantial factor. However, the plaintiff must show that "the asbestos was a substantial factor in the injury is more than conjectural." It was undisputed that the plaintiff was exposed to Foster Wheeler boilers.

However, the plaintiff relied on an affidavit from a Foster Wheeler employee that averred that asbestos containing insulation was used extensively on boilers in the 1950s. The plaintiff testified that a gasket was also present on the sludge drum of the boiler. The defendants countered that nothing demonstrated the age or service history of the boilers. Therefore, the plaintiff could not establish who made the insulation or asbestos used on the boilers. Finally, the court was not persuaded by older cases cited by the plaintiff where the defendants may be held liable for the foreseeable use of asbestos in original products. Relying on the recent decision in *In re Asbestos Prods. Liab. Litig.*, the court noted the plaintiffs did not put forth evidence that "the crucial question of whether the original, asbestos

containing components were present in the boiler during maintenance." Consequently, the court found no error in the report and recommendation. Summary judgment was therefore entered.

Read the full decision here.

Other Maritime/Admiralty Law Decisions:

- **Bare Metal**
  - **Standard Based Approach in Bare Metal Defense Permits Sailors to Recover in Negligence**
    (U.S. Court of Appeals, Third Circuit, October 3, 2017)
  - **Various Defendants Granted Summary Judgment Under Maritime Law Bare Metal Defense**
    (U.S. District Court for the District of Delaware, August 31, 2017)
  - **Summary Judgment Recommended for Naval Boiler Manufacturer on Issues of Product Identification and Bare Metal Defense**
    (U.S. District Court for the District of Delaware, August 21, 2017)
  - **Madison County Jury Renders Defense Verdict for Brake Grinder Manufacturer**
    (Madison County, Illinois, Third Judicial Circuit, February 28, 2017)
  - **Valve Manufacturer's Summary Judgment Denied in Failure to Warn Case Despite Bare Metal Defense**
    (U.S. District Court for the District of South Carolina, Charleston Division, February 13, 2017)

Motions in Limine Decisions

Various Rulings Issued on Motions in Limine in Trial; Plaintiffs' Motion to Exclude Defense Experts Denied

(U.S. District Court, Western District of Wisconsin, July 7, 2017)

The court issued various rulings on motions in limine filed by both the plaintiffs and defendant John Crane in this matter that is set for trial on July 17, 2017. The decedent died of mesothelioma. Many of the motions were unopposed. Below are summaries of the more pertinent rulings.

Regarding the plaintiff's motions, the plaintiff argued that the defendant should be barred from disclosing that some corporations were in bankruptcy. The defendants opposed the motion because under Wisconsin law, any claims plaintiffs have submitted to bankruptcy trusts were admissible. The court agreed that any claims the plaintiffs have asserted that other entities were responsible for the development of the decedent's mesothelioma were potentially relevant, thus denied the motion in part, but granted the motion to the extent it sought to exclude any mention of court bankruptcy of others in the asbestos industry.

The plaintiffs also moved to preclude the opinion offered by the defendant's experts James Crapo, Victor Roggli and Mary Beth Beasley, that there existed a minimum threshold of chrysotile exposure required to cause mesothelioma. The plaintiffs cited a number of scientific sources for the proposition that there was no recognized safe level of exposure to any type of asbestos, and asserted that "multiple courts" have excluded the chrysotile threshold opinion. The defendant argued that the "dose evidence" analysis to estimate the amount of asbestos fibers a person was exposed to was a scientific, widely-used method to determine substantial causation. The court reviewed Federal Rule of Evidence 702 and Daubert v. Merrell Dow Pharmaceuticals, and held that the plaintiffs' citations to multiple

sources supported a finding that there was no scientifically recognized safe level of exposure. However, with multiple exposures, there was support for the argument that minor exposure was likely to produce little risk of developing mesothelioma, sufficient to satisfy FRE 702. The court found: "..accepting plaintiffs' argument to the contrary would amount to endorsing an 'any exposure' liability theory…". This assertion has been excluded by numerous courts. This motion was denied. The court also denied the plaintiffs' motion to exclude the defendant's expert John Henshaw, a prior OSHA employee, and Margaret McCloskey, who opined on the decedent's level of exposure to asbestos while a boiler tender in the Navy.

Regarding the defendant's motions, the court issued various rulings with little analysis and reserved its ruling on many of the motions.

Read the full decision here.

Defendants' Motion in Limine Denied on Multiple Issues; Including Regulatory Materials, Past Conduct, MAS Studies and Expert Testimony Based on Animal Studies

(Supreme Court of New York, New York County, April 5, 2017)

The plaintiff filed this action against several defendants alleging his asbestos related disease was caused by products for which the defendants were liable. Mr. Evans worked as a cable puller for Western Electric from 1946-48, as a grounds man and lineman for Queens Gas and Electric from 1948-52, as an HVAC worker for multiple employers from 1952-63 and again in a mechanic and supervisory role from 1965-68 at residential and commercial sites. He also claimed potential bystander exposure from residential jobs including roofing, flooring, ceiling, door, plaster work, and from trades working on boilers in his vicinity.

The defendants filed an omnibus motion in limine to preclude 1) improper specific causation 2) argument or evidence of statements made by government agencies or regulations concerning asbestos 3) evidence or argument of knowledge/conduct post Plaintiff's last exposure 4) testimony of Dr. Arnold Brody 5) testimony/evidence of MAS and MVA employees or work protocol and 6) testimony that the defendants are liable for products they did not make or supply. The court noted that its decision on improper specific causation will be made after hearing on that specific issue.

Preclusion of Regulatory Materials and Public Health: Based on the *Parker* decision, evidence concerning regulatory statements including publications should be precluded from evidence according to the defendants. Specifically, the defendants took the position that regulatory agencies' positions with respect to the dangers of asbestos were irrelevant to causation. Further, regulatory agencies were acting to offer preventative measures rather than opinions on causation. Finally, the defendants cited the prejudice they would suffer should this evidence be heard by the trier of fact as many of the regulatory statements were made post last known exposure. The plaintiffs disagreed and pointed out that the request was "overly sweeping and premature." Further, the plaintiffs noted that the motion in limine did not point out any one *specific* statement or regulation in support of their motion. Particularly, the plaintiffs argued that the statements targeted for preclusion are routinely admitted in asbestos litigation and are relied upon by the plaintiffs' experts. Also, the plaintiffs' countered that the *Parker* decision is not interpreted to mean that standards cited by the defendants are wholly irrelevant. The court denied the motion but directed the plaintiffs to furnish a list of such documents they intend to offer and identify the appropriate hearsay exceptions. As for studies concerning protective measure, the court precluded their admission to prove causation.

Evidence Regarding Knowledge of Conduct Post: The defendants also moved to preclude evidence post-dating the plaintiff's last known exposure to asbestos including post remedial measure taken by the defendants. The plaintiffs countered that the request was premature. Further, the plaintiffs argued that this evidence was directly related to corporate knowledge and causation. Specifically, the dangers of asbestos coupled with the lack of use due care went to the heart of the negligence claims according to the plaintiffs. Moreover, New York law required a post-sale duty from the defendants. The court agreed with the plaintiffs and noted the motion sought a blanket exclusion of evidence without identifying any specific evidence.

Preclude the Testimony of Dr. Brody: The defendants argued that Dr. Brody should be excluded from testifying because his studies were based on animal studies. The plaintiffs took the position that animal studies were relevant as they have been used for years in asbestos disease research. The plaintiffs also argued that the defendants could cross examine Dr. Brody on the issue of animal studies versus human studies. The defendants disagreed and argued that his testimony was duplicative with the plaintiffs' other expert Dr. John Maddox. Plaintiffs countered that Dr. Maddox was a medical doctor and pathologist whereas Dr. Brody held a Ph.D. in Cell Biology. More importantly though, the plaintiffs argued they needed Dr. Brody to testify on the development of cancer on a cellular level. The

defendants continued their argument by illustrating the prejudicial value of using “magnified rat lung cells” to give the impression that disease occurred immediately upon inhalation. The court denied the defendants’ motion stating that nothing was presented showing that animal studies are not related to human diseases
.

Precluding the Testimony of any MAS and MVA Employee and to Exclude Evidence of any MVA Work Practice Studies: The defendants had argued that the plaintiffs would improperly use these videos to establish that the plaintiff was exposed to respirable fibers. Specifically, the videos/studies violated New York law according to the defendants by 1) using methodology not generally accepted in the scientific community 2) permitting irrelevant evidence 3) allowing any probative value to be outweighed by its prejudicial effect. Additionally, the defendants took exception to the use of Tyndall Lighting videos which used special lighting to enhance the visual effect of dust in the air. The plaintiffs countered that the motion should be denied because 1) it was overbroad 2) the studies would assist the jury in understanding the plaintiff’s exposure 3) the studies are reliable 4) the methodology is widely accepted 5) many courts have admitted such evidence in the past. Prior to the hearing, the plaintiffs stipulated that no MAS and MVA employee would testify at trial. However, they would not rule out that their expert, Dr. Carl Brodkin, would discuss them in his testimony. The court denied the defendants motion to exclude evidence of MAS and/or MVA videotapes and studies citing that although one judge had found them to be “junk science” the defendants had not offered any scientific evidence warranting a *Frye* hearing. The court was also persuaded that the EPA may have endorsed Tyndall Lighting.

Preclude Plaintiff from Arguing that Defendants are Liable for Products They Did Not Manufacture or Supply: The defendants also moved to preclude evidence that they may be liable for asbestos used in or around their equipment that was not supplied by the defendants. The defendants noted that under the *Dummit* decision they had a duty to warn of the danger arising under the foreseeable use of its product in combination with a third party product when necessary to enable the
manufacturer’s product to function as intended. The defendants relied on the court’s comment that “a commonsense line at which the duty ends” must be drawn. This line included a balance of factors. The defendants argued this case fit into that framework with respect to material they did not supply or manufacture. On the other hand, the plaintiffs argued that this argument was really one of summary judgment and not a motion in limine. The plaintiffs also noted that New York courts have repeatedly held equipment defendants liable for replacement components containing asbestos to be used in those defendants’ equipment. The court disagreed with the defendants and denied the motion citing case law that created a duty to warn on the part of the defendants.

Compel Filing of Plaintiffs’ Proof of Claims or to Forever Enjoin Filing Claims with Bankruptcy Trusts: The court found this portion of the motion as moot based on the plaintiffs’ representation at the March 29 hearing that all proofs of claims had been submitted and that no additional claims would be filed.

Read the full decision here.

Various Rulings in NYCAL Case Regarding Defendants’ Motion in Limine to Preclude Certain Evidence

(Supreme Court of New York, New York County, January 4, 2017)

The plaintiff alleged asbestos exposure through his work as a roofer, maintenance man, and carpenter. The defendants submitted a joint motion in limine to preclude certain evidence. The court issued various rulings, summarized below.

First, the defendants asserted that Dr. Jacqueline Moline would offer a scientifically unsupportable causation opinion that every occupational exposure was a substantial factor in causing the plaintiff’s mesothelioma. This was also known, among other things, as the “each and every exposure” or “cumulative exposure” theory. At the outset the court noted this was a mischaracterization of the plaintiff’s theory, as these theories were different. In support, the defendants cited to various cases around the country which have rejected the “every exposure” theory. The defendants also requested a Frye hearing on this issue. The plaintiff argued this testimony raised issues of causation for the jury, and that New York law held that an expert’s testimony that exposure to visible asbestos-containing dust was sufficient to support causation. Further, the plaintiff explained this was a cumulative exposure theory. The court denied the defendants’ motion, based on prior New York law upholding jury verdicts based on the plaintiff’s testimony of regular exposure and expert testimony that such exposure was a proximate cause of mesothelioma. Further, the defendants’ emphasis on quantifying exposures “ignores the reality that the asbestos-containing product at issue is almost always no longer on the market or otherwise available, and therefore, is not capable of being tested .. it is ‘inappropriate to set an insurmountable standard that would effectively deprive toxic tort plaintiffs of their day in court.’”

Second, the defendants sought to preclude regulatory materials and public health announcements, arguing that these were irrelevant to causation where such agencies acted in a broad preventative role; such regulations were based on outdated science and included a causation standard below the legal standard required to establish causation in court actions, and were hearsay. The plaintiff replied that this request was overly broad, premature, and such regulations were regularly admitted in asbestos cases. The court issued various rulings with this request, but noted that the plaintiff seemed to acknowledge that the standards promulgated as protective measures were inadmissible to demonstrate causation.

Third, the defendants sought to preclude various "state-of-the-art" witnesses, arguing that these witnesses were little more than librarians of assorted, carefully selected articles regarding defendants' alleged knowledge of asbestos hazards. The plaintiff argued Drs. Castleman, Rosner, and Markowitz were highly qualified to address this issue. The court denied this motion in limine; these witnesses had specialized knowledge to assist the trier of fact and the defendants were free to submit counter evidence.

Fourth, the defendants argued that the plaintiff should be precluded from imputing trade association actions and knowledge to the defendants; the plaintiff argued this motion was premature and that that such evidence was relevant. The court denied this motion in limine. Potential evidence concerning the knowledge of trade associations could be considered as a basis for a jury's finding on a duty to warn.

Finally, the court denied the defendants' motion in limine to use interrogatory answers and corporate representative depositions from settled and bankrupt defendants. New York rules of evidence do not allow for admission of same.

Read the full decision here.

Other Motions in Limine Decisions:

- **Expert Challenges**
    - **NYCAL Court Denies Motion in Limine to Preclude Plaintiff's Causation Experts**
      (Supreme Court of New York, New York County, April 14, 2017)
    - **Daubert Challenges Result in Experts Being Allowed to Testify Regarding General Causation; Not Specific Causation**
      (U.S. District Court for the Eastern District of Louisiana, March 6, 2017)

Pleadings Challenge Decisions

California Government Claims Act Bars Plaintiffs' Asbestos Action for Untimely Commencement

(California Court of Appeals, June 26, 2017)

Plaintiffs Sandra Reyes Jauregui and Mario Reyes Jauregui filed a first amended complaint against the City of Pasadena arising from Sandra Jauregui's mesothelioma. The City demurred to the complaint, arguing that the plaintiffs failed to comply with the Government Claims Act, requiring presentation of the claim to the City within six months of the date of Sandra's mesothelioma diagnosis. The court agreed and issued a writ sustaining the demurrer. The plaintiffs originally filed a complaint against various defendants due to her father's asbestos exposure while working as a mechanic at different sites, including the City of Pasadena from 1980-87. One year after filing the original complaint the plaintiffs added the City as a defendant, on October 14, 2016. Under the Government Claims Act (Gov. Code, § 810 et seq.), before commencing an action against a public entity, a plaintiff must present the claim to the entity within six months of "the date upon which the cause of action would be deemed to have accrued within the meaning of the statute of limitations which would be applicable thereto." The first amended complaint stated that on August 22, 2016, the plaintiffs presented their claim to the City in compliance with this Act.

On November 17, 2016, the City demurred, arguing that the plaintiffs failed to allege facts demonstrating or excusing compliance with the Act. The City argued the cause of action accrued on September 25, 2015, the date when Sandra

was diagnosed. The claim was not presented to the City until 11 months after the diagnosis. The plaintiffs argued there was no limit on their claim presentation; the accrual of the underlying claim was defined as the trigger date for the underlying limitations period, which was never triggered. The plaintiffs also argued that "accrual" had two meanings – (1) ripeness and (2) beginning of the limitations period. Here, the plaintiffs argued that "accrual" meant the latter. On December 15, 2016, the trial court overruled the demurrer without explanation.

The appellate court analyzed the term "accrual." The plaintiffs were obligated to present their claims against the City "not later than six months after the accrual of the cause of action." (Gov. Code, § 911.2.)4 "For the purpose of computing the time limits prescribed by [Government Code section] 911.2 … , the date of the accrual of a cause of action to which a claim relates is the date upon which the cause of action would be deemed to have accrued within the meaning of the statute of limitations …" (Gov. Code, § 901.) Thus, to calculate the claim presentation deadline, the court first determined the date the cause of action accrued under the applicable statute of limitations.

Under California statutes, the limitations period did not begin until the asbestos-related injuries caused a permanent termination of the plaintiff's ability to perform his or her job; for retirees and the unemployed, the limitations period never commenced. The parties agreed here that Sandra was never disabled within this meaning, thus the limitations period never began. However, the statute of limitation did not use the term "accrued." This term was used in a different section, which stated that "Civil actions, without exception, can only be commenced within the periods prescribed in this title, after the cause of action shall have accrued …." Thus, accrual was a prerequisite to the running of the limitation period.

Generally, a cause of action accrued when it was complete with all of its elements – wrongdoing, harm, and causation. An exception to the general rule regarding the initial accrual of a claim was the discovery rule – the accrual of a cause of action was delayed until the plaintiff discovered, or has reason to discover, the cause of action. The discovery rule applied to delay the accrual of a cause of action for an asbestos-related disease. In undertaking this analysis, the court found that, in the context of statutes of limitations, "accrual" of an action was used in the sense of ripeness.

Thus, the court concluded that as used in Government Code section 901, the date upon which the cause of action would be deemed to have accrued within the meaning of the statute of limitations is the date on which the cause of action became actionable. Here, the cause of action against the City accrued when Sandra discovered or reasonably should have discovered that she suffered a compensable injury. This date was no later than the date she was diagnosed with mesothelioma, September 25, 2015. Since the plaintiffs did not submit their claim until more than 10 months after Sandra was diagnosed, the trial court should have sustained the City's demurrer because the plaintiffs' action against the City was barred. This interpretation did not bar an action by plaintiff who, years after exposure, discovers a compensable injury; it required only that after making the discovery, the claim be promptly presented to the government entity sought to be held responsible.

Read the full decision here.

Lung Cancer Case Transferred After Defendants Successfully Argue Forum Non Conveniens on Appeal

(Appellate Court of Illinois, June 13, 2017)

Plaintiffs Irvin and Marlene Rohl brought this action against several defendants including Caterpillar and Navistar. The plaintiffs argued that Mr. Rohl's lung cancer was caused by exposure to asbestos from brakes, gaskets, clutches, engines, and heavy duty equipment made by Caterpillar and Navistar.

At the trial level, the defendants moved to transfer the case from Cook County to Winnebago County on the doctrine of forum non conveniens. The court denied the motion after a finding that the plaintiff had attended trade school in Cook County in the late 1940s.

On appeal, the court took exception with the factual record relied upon by the trial court. The court started its analysis by delineating the elements of forum non conveniens. Essentially, the doctrine is a balancing test between public and private interests. "The private factors include 1) the convenience of the parties, 2) the relative ease of access to testimonial and documentary evidence, and 3) all other practical problems that make trial of a case "easy, expeditious and inexpensive," while the public interest factors include 1) the interest in deciding controversies locally, 2) the unfairness of imposing trial expense and the burden of jury duty on residents of a forum with little connection to the litigation, and 3) the administrative difficulties presented by adding litigation to already congested court dockets." The court noted that deference on the chosen forum is given to the plaintiff. However, that deference is eroded where the injury did not occur in that forum.

Here, the plaintiffs lived in Winnebago County their entire adult lives. Further, the plaintiff was not sure if he was exposed to asbestos at the trade school in Cook County. The plaintiff's counsel took the position that any exposure above background contributed to the development of his lung cancer. However, the court noted that the equipment at the trade was new and clean by the plaintiff's own account. Accordingly, there was no use of compressed air at the Cook County trade school. The defendants argued that the plaintiff's spouse could not argue that its convenient for her to litigate in Cook County since she lived in Winnebago County. The defendants were not entitled to this argument according to the Court. On the other hand, the plaintiff did not argue why Winnebago would be inconvenient for her. Therefore, the convenience factor did not strongly favor either forum. However, the access to testimonial evidence clearly favored Winnebago County. Witnesses including family members, co-workers, and most treating physicians lived or worked in Winnebago County. Also, the court noted that the plaintiff's employment and medical records were in Winnebago County. The public interest factors weighed in favor of transfer according to the court. Exposure for over 45 years took place in Winnebago County. Finally, court congestion was not much of a factor despite some lag time for verdicts in Winnebago County compared to Cook Court. With these factors in mind, the court reversed the trial court and transferred the plaintiff's case to Winnebago County.

Read the full decision here.

Automotive Parts Manufacturer Granted Dismissal due to Lack of Personal Jurisdiction

(U.S. District Court for the Western District of Washington, May 23, 2017)

In another decision out of the *Hodjera* suit in the Western District of Washington, the motions to dismiss of Dana Companies, LLC and Dana Canada Corporation (the defendants), were granted based on lack of personal jurisdiction.

Dana Companies is a Virginia corporation with its principal place of business in Ohio. Dana Canada is a Canadian corporation with its principal place of business in Ontario. The plaintiff alleged that he was exposed to asbestos in Toronto, Ontario, between 1986 and 1994. Neither company is registered to do business in Washington; nor has either appointed a registered agent in Washington. Neither company has facilities, real property, offices, or employees in Washington.

A court can establish personal jurisdiction over a particular defendant through either general or specific jurisdiction. The court first found that because neither company is subject to general jurisdiction in Washington because neither were incorporated in Washington and do not have their principal place of business in Washington. Further, the court did not find it had specific jurisdiction of the defendants. A defendant may be sued in a forum where it has minimal contacts, provided those contacts are purposefully directed at the forum, the claim arises out of those contacts, and the exercise of jurisdiction over that party is reasonable. The plaintiffs failed to satisfy the requirement that their claim arose out of the defendants' purposeful contacts with Washington. The court commented, "Though plaintiffs allege that Mr. Hodjera's asbestos exposure occurred in Toronto, Ontario, where Dana Canada presumably conducted business, plaintiffs have not alleged that Mr. Hodjera's exposure in Ontario would not have occurred "but for" Dana Canada's contacts with Washington." As a result, the court granted the defendants' motion to dismiss.

Read the full decision here.

Appellate Court Affirms Dismissal in Federal Court Without Prejudice; Allows Plaintiffs to Refile in State Court

(U.S. Court of Appeals for the Ninth Circuit, March 9, 2017)

Plaintiffs Richard Zanowick and Joan Clark-Zanowick filed suit in state court in July 2014. The defendants timely removed the case to federal court on diversity grounds a month later. With the case now in federal court, Richard Zanowick passed away on October 12, 2014. The plaintiffs filed and electronically served a notice of his death on November 17, 2014. Pursuant to Rule 25(a)(1), the plaintiffs were required to file a motion to substitute a new party for Richard Zanowick within 90 days, or in this case February 19, 2015. The plaintiffs failed to do so.

Joan Clark-Zanowick and her children contemporaneously filed a new lawsuit in state court. This claim alleged similar claims against the same defendants. It also included additional defendants that arguably prevented diversity jurisdiction. The defendants argued that the new defendants were merely added for the sole purpose of defeating diversity. In April 2015, the defendants filed a motion to dismiss the federal case with prejudice for noncompliance

with the 90-day substitution requirement of Rule 25(a)(1). Shortly after, on May 1, 2015, the plaintiffs moved to dismiss the federal action voluntarily without prejudice under Rule 41(a)(2), or in the alternative, to substitute a new party or extend the Rule 25(a)(1) deadline. The District Court heard these motions in June 2015 and held because Rule 25(a)(1) was not jurisdictional, the court reasoned that it could allow the substitution of a party despite non-compliance with the 90-day rule. After confirming that Zanowick preferred dismissal without prejudice even if late substitution were permitted, the district court granted Zanowick's Rule 41(a)(2) motion to dismiss without prejudice. The defendants appealed.

The United States Court of Appeals for the Ninth Circuit heard the appeal and outlined that Rule 41(a)(2) "allows a plaintiff, pursuant to an order of the court, and subject to any terms and conditions the court deems proper, to dismiss an action without prejudice at any time. And "[w]hen ruling on a motion to dismiss without prejudice, the district court must determine whether the defendant will suffer some plain legal prejudice as a result of the dismissal. "Legal prejudice" is "prejudice to some legal interest, some legal claim, some legal argument." [Citation Omitted]. In addressing any potential prejudice against the defendants, the court stated that "unfortunately for defendants, the "history of Rule 25(a) and Rule 6(b) makes it clear that the 90 day time period was not intended to act as a bar to otherwise meritorious actions, and extensions of the period may be liberally granted." Id.

The court ultimately rejected the defendants' contentions that Rule 25(a)(1) required dismissal with prejudice, and affirmed the district court's order dismissing this action without prejudice under Rule 41(a)(2).

Read the full decision here.

Defendants' Motion for Judgment on the Pleadings Granted, but Plaintiffs Allowed to Amend Complaint

(U.S. District Court for the District of Maryland, January 3, 2017)

The plaintiffs initially filed a "short form asbestos complaint" in the Circuit Court for Baltimore City, Maryland, that included general counts for negligence, strict liability, loss of consortium, conspiracy, and fraud. The plaintiffs also realleged and incorporated counts for wrongful death from the master complaint. The case was removed to federal court and the defendants filed the motion for judgment on the pleadings under Rule 12(c), among other arguments, with the United States District Court for the District of Maryland. A motion for judgment on the pleadings under Rule 12(c) is assessed under the same standard applicable to motions to dismiss under Rule 12(b)(6). Here, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. [Citation Omitted].

In reviewing the motion papers, the court noted that in the short form complaint, the operative pleading in this action, the plaintiffs assert only one wrongful death count but base it upon both negligence and strict liability. Further, it was not clear from the short form complaint's incorporation of the master complaint, including conspiracy and fraud, whether the court was expected to regard those theories as being included in the single, wrongful death count. The court further emphasized that, as to each defendant, the plaintiffs must allege sufficient factual content to permit a reasonable inference that such defendant engaged in actionable misconduct. But in this case, the plaintiffs had, instead, relied upon broad conclusions and a formulaic recitation of the elements of negligence and strict liability. They lumped all the defendants together generally, made no effort to allege facts particular to any defendant, and failed to narrow the relevant time period as to each defendant. Additionally, the plaintiffs alleged no facts to satisfy the "frequency, regularity, proximity" test required under Maryland law to establish causation in asbestos claims. Finally, if the plaintiffs were to advance causes of action based upon conspiracy and fraud, then their complaint also fails to state claims for relief under those theories. As to fraud, the plaintiffs were required to plead this cause of action with particularity, which they failed to do.

Due to the general nature of the plaintiff's allegations and insufficiency of their claims, the defendants' motion was granted. However, it is important to note that the plaintiffs were permitted the opportunity to file an amended complaint correcting the deficiencies noted in the court's decision.

Read the full decision here.

Remand/Removal Decisions

Amended Complaint Deleting Federal Claims Does Not Destroy Jurisdiction Over a Validly Removed Case

(U.S. District Court for the Eastern District of Louisiana, December 6, 2017)

This decision arises out of the court's review of the plaintiffs' motion to remand, and appellant's motion for review of an order granting plaintiffs leave to amend their complaint. The shipyard worker plaintiff originally filed an action in state court naming numerous defendants. The initial petition included failure to warn and negligence claims against the appellant, among other causes of action, and strict products liability and failure to warn claims against a boiler defendant, who also opposed the motion to remand. Approximately three months after the first pleading, the plaintiffs filed an amended petition adding a defendant, and asserting strict liability claims as to the appellant and the new defendant.

Following a witness deposition that connected the plaintiff's injuries to work on U.S. Navy ships, the appellant filed its notice of removal alleging federal officer jurisdiction. The plaintiffs subsequently requested leave to file an amended complaint to delete their strict liability claims against the appellant, alleging that these claims were brought in a good faith error. Leave to amend was granted, and the instant defendant appealed. The plaintiffs opposed the appeal, and moved to remand.

Appellants argued that the amended pleading deleting strict liability claims was in bad faith because it was intended to defeat federal jurisdiction, while also arguing that the amendment was futile because it cannot destroy federal jurisdiction. The court concluded that there was no error in granting the leave to amend. Courts are permitted to freely give leave to amend when justice requires. The court further noted that the "amended complaint does not automatically destroy federal jurisdiction," which "weighs in favor, rather than against, permitting amendment."

Next considering the plaintiffs' motion to remand, the court began its analysis by noting that its jurisdiction was based on the notice of removal, not the amended complaint. While an amended complaint deleting federal claims "may permit a discretionary remand, it does not destroy federal jurisdiction over a validly removed case." The court noted that appellants had a strong body of law supporting their right to remove the matter based on the plaintiffs' strict liability claims. Appellants properly supported their notice of removal and presented a colorable defense of federal contractor immunity. A "good faith error may justify granting leave to amend. But plaintiffs' error does not create a jurisdictional defect in the notice of removal." In response to the plaintiffs' argument that the amended complaint removed the federal question, necessitating remand, the court further bolstered its decision to deny the motion to remand given the boiler defendant's opposition, and their assertion of a federal contractor defense in pleadings, which the court analyzed and found as sufficiently colorable to defeat remand.

Read the full decision here.

Removal Upheld on Government Contractor Defense for Turbine and Gasket Manufacturers

(U.S. District Court for the Southern District of New York, November 27, 2017)

Plaintiffs Michael and Anne Donohue brought suit against multiple defendants including Westinghouse (CBS) and Crane Co. alleging Mr. Donohue contracted mesothelioma from exposure to asbestos containing products for which the defendants were liable. Mr. Donohue claimed exposure from his time working in the Navy and with the New York Fire Department (NYFD).

CBS removed the case one day after the plaintiff's trial deposition. Crane quickly joined the removal. Both asserted the government contractor defense which shields liability in certain instances. The plaintiffs moved to remand. In order to invoke the defense, the defendants must show that 1) the defendant is a federal agency or officer, or acted under the control of one 2) the defendant has a colorable federal defense and 3) the defendant can establish a causal connection between the conduct in question and the federal directive. The court began its analysis and reviewed the first prong. First, the court noted that corporate entities are considered persons under the statute. The court also concluded that both CBS and Crane had acted under the directions of Navy specifications. As for the second prong, the court stated that the government contractor defense burdens the defendant in a failure to warn case to show that 1) the government control over the nature of the product warning 2) compliance with the Government's directions and 3) communication to the government of all product dangers known to the defendant but no to the government. Here,

the plaintiff contended that the defendants' papers were bereft of evidence that could form a colorable government contractor defense. Specifically, the plaintiffs honed in on the fact that the defendants' affidavits submitted with the removal did not discuss the specific ships Mr. Donohoe served upon or the asbestos equipment that purportedly caused his injury. The court stated that at this "juncture" the question is whether defendants have a colorable defense and not whether the defense would prevail on the merits. As for the final prong, the court stated that CBS and Crane's affidavits were strong enough to put forward the issue as to whether there was a "causal nexus between sale of Defendants' equipment to the Navy pursuant to its specifications and Plaintiff's alleged injuries." The plaintiffs took the position that the defendants are required to do more than offer evidence to assert the casual nexus. However, the court noted that that is not the case based on the decision in *Nesbiet*. Consequently, the motion to remand was denied.

Read the full decision here.

Plaintiff's Failure to Establish Causation and Lack of Opposition Leads to Grant of Summary Judgment

(U.S. District Court for the Western District of Kentucky, October 27, 2017)

Rojelio Surita brought this action against several defendants alleging his decedent, Nancy Surita, developed mesothelioma from exposure to asbestos containing products for which Defendants were liable. Nancy Surita gave deposition testimony stating that she assisted in brake jobs on the family farm while growing up in Illinois. She also recalled maintenance on vehicles while serving in the National Guard. Later she testified as to working on military trucks. Although she recalled Caterpillar as the manufacturer of the transmissions, she testified that she did not perform transmission work. As for the brakes, she was unable to recall the brands of the removed or replacement brakes. Caterpillar removed the case to the United States District Court. The defendants moved for summary judgment. The plaintiff filed no opposition.

The court reviewed the standard for summary judgment and stated that summary judgment " is appropriate when the record, viewed in the light most favorable to the nonmoving party, reveals there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Of course, the burden falls upon the party seeking summary judgment. And where a party fails to file an opposition, the moving party still must establish the plain language of the rule for summary judgment. The motions filed by the defendants all made the same argument that the plaintiff had failed to establish causation as there was nothing establishing that defendants' products were a substantial factor in causing Ms. Surita's mesothelioma. Certain defendants also moved for summary judgment as to the plaintiff's claims on misrepresentation as moot. In analysis of the facts, the court concluded that the plaintiff must show that the "product of each defendant was a substantial factor in bringing about" the illness. Although the complaint made those allegations, the plaintiff did not illustrate how those products "probably caused" the illness. The court also noted that he did not file an opposition to establish the same. Relying on the *Moeller* case, the court analyzed another similar case whereby exposure to another product may have caused the plaintiff's illness as opposed to establishing that the exposure "probably" caused the illness. From that case, the court noted the distinction between what may have caused and probably caused and concluded that the plaintiff had not established substantial factor as to any of the defendants. Accordingly, summary judgment was granted as to the moving the defendants. Further, the plaintiff's claims for misrepresentation also failed as a derivative from lack of causation. Finally, the plaintiff's count for punitive damages and loss of consortium were denied as moot.

Read the full decision here.

Defendant's Third-Party Claims Remain Stayed in Federal Court While Plaintiff's State Law Claims Remanded

(United States Court of Appeals, Fourth Circuit, October 24, 2017)

The plaintiff filed a complaint in the Circuit Court for Baltimore City, MD alleging state law claims arising from asbestos exposure against defendant/appellant Campbell-McCormick (CMC) and others. CMC subsequently filed a third-party complaint against GE and 12 other co-defendants for contribution. GE removed the case to the District of Maryland, asserting federal contractor defenses. The plaintiff filed a motion to sever and remand, and specifically requested the district court to decline to exercise supplemental jurisdiction of the plaintiff's state law claims pursuant to 28 USC 1367(c).

The district court granted the plaintiff's motion to sever and remand. However, they also retained jurisdiction over, and stayed CMC's third-party claims. The court explained in their opinion that a declination is permitted only when the claim "substantially predominates over" the claim that accords original or removal jurisdiction. Thus, severance and

remand is appropriate, because the plaintiff's state law claims are superior to the federal contractor defense, which provided the original jurisdiction for this court, and which would only be relevant if defendants were found liable for the plaintiff's state law causes of action. The court reasoned that no prejudice to the defendants arose out of their ruling, given that CMC and other defendants were not blocked from asserting contribution claims after a judgment was entered in the main action. CMC appealed, and the Appellate Court requested briefing on bases for appellate jurisdiction, specifically the collateral order doctrine.

CMC argued that a remand order based on the district court's declination of supplemental jurisdiction is considered to be a final appealable decision because it either ends the federal matter on the merits, or it qualifies for review under the collateral order doctrine. Regarding the first contention, the Appellate Court found that the district court's ruling was not a final decision, as the district court retained jurisdiction over, and stayed the third party claims. Then, they entertained CMC's arguments on the collateral order doctrine, which argued that adjudication of the plaintiff's claims in federal court would enhance fairness and judicial economy, and prevent inconsistent verdicts.

The collateral order doctrine encompasses a "small class of decisions which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require appellate consideration to be deferred until the whole case is adjudicated." To qualify for collateral order review, an order must 1) conclusively determine a disputed question, 2) resolve an important issue completely separate from the merits of the action, and 3) be effectively unreviewable on appeal from final judgment. The Appellate Court keyed in on the "importance" requirement, and found that CMC was unable to demonstrate how the Appellate Court's failure to review the district court's order severing and remanding the plaintiff's claims would "endanger 'a substantial public interest' or 'some particular value of high order.'" The court stated that CMC's right to keep the plaintiff's state law claim in Federal Court "pales in comparison to those interests that have been deemed sufficiently important to give rise to collateral order jurisdiction," and even to some interests (such as the attorney-client privilege) that have been ruled insufficiently important." Appeal dismissed for lack of jurisdiction.

Read the full decision here.

Remand Denied and Plaintiffs' Mesothelioma Suit Dismissed Based on Lack of Personal Jurisdiction

(U.S. District Court for the District of Minnesota, October 10, 2017)

In March 2016, the plaintiffs filed suit against multiple defendants, including Conwed Corporation, in Missouri Circuit Court in St. Louis alleging that the husband plaintiff's mesothelioma was caused by exposure to the defendants' asbestos-containing products, including Conwed's ceiling tile. On January 19, 2017, the Missouri Circuit Court dismissed the plaintiffs' complaint against Conwed without prejudice, finding, in part, that Conwed was "a Delaware corporation with its principal place of business in New York." The plaintiffs refiled suit on March 16, 2017 in Ramsey County District Court, Minnesota against Conwed and served the summons and complaint upon C.T. Corporation Systems, Conwed's registered agent in Minnesota. On April 4, 2017, Conwed removed the case to federal court, invoking federal diversity jurisdiction.

The plaintiffs' advanced three separate arguments for why the court should exercise personal jurisdiction over the defendant: (1) consent; (2) general personal jurisdiction; and (3) specific personal jurisdiction. Conwed had not been authorized to transact business in Minnesota since 2009, and the plaintiffs' cause of action arose out of a 2015 mesothelioma diagnosis, therefore , the court held there was no personal jurisdiction by virtue of consent. The court found that "general jurisdiction over Conwed is clearly lacking" because there was no evidence Conwed's operations in Minnesota were "so substantial and of such a nature to render it at home in this state." Finally, the court examined three main jurisdictional factors considered by the Eighth Circuit — the nature, quality, and quantity of the defendant's contacts with the forum, and the relation to the cause of action — and held they weighed against exercising specific personal jurisdiction over the defendant. Additionally, two secondary factors, the interest of the forum and the convenience of the parties, did not alter the court's calculus in the plaintiffs' favor. Ultimately, the court denied the plaintiffs' Motion to Remand to State Court and granted the defendant's Motion to Dismiss for lack of personal jurisdiction without prejudice.

Read the full decision here.

Fraudulent Joinder Determination Turns Only on Factual and Legal Basis, Not Intent

(U.S. District Court for the Western District of Missouri, Central Division, October 3, 2017)

Kansas resident plaintiffs filed an action in the Circuit Court of Jackson County, Missouri, alleging mesothelioma and asbestosis arising out of work first performed in the state of Missouri. Two defendants named in the state court petition were also residents of Kansas, and the rest were from various states. Defendant Athene Annuity & Life Assurance Company removed the case on the basis of diversity. In response to the plaintiffs' motion to remand, Athene alleged that the plaintiffs had no intention of prosecuting claims against the Kansas defendants. The plaintiffs countered by expressing their intention to seek default judgment from one of the Kansas defendants, Fuhrco, Inc.

As the party seeking to remove, Athene had the burden of establishing subject matter jurisdiction. In briefs, Athene did not contend that the plaintiffs' claims against Fuhrco were without a factual and legal basis. Instead, they argued that the plaintiffs had no intention of prosecuting claims against Fuhrco, rendering the plaintiffs joinder of Fuhrco fraudulent. The court entertained Fuhrco's case law, but came to the conclusion that none of the cited decisions turned on intent, and in all examples the decisions were based on whether a rational basis in law and fact existed for naming the non-diverse party as a defendant. "Thus, notwithstanding Athene's arguments, the law is settled. The Plaintiffs' intent to prosecute Fuhrco is irrelevant in light of the undisputed fact that they have a reasonable basis in fact and law to sue Fuhrco."

Read the full decision here.

Lack of Service on Forum Defendants Fails to Defeat Removal Due to Diversity Jurisdiction

(U.S. District Court for the Eastern District of Louisiana, September 30, 2017)

The plaintiffs originally filed their petition in the Civil District Court for the Parish of Orleans, State of Louisiana, after William Leech died of mesothelioma. The plaintiffs were residents of Arizona and named numerous defendants, including three who were Louisiana residents. Nine days after the petition was filed, and before any other defendants were served, defendant Honeywell International removed the action to federal court on the basis of diversity jurisdiction, which was uncontested.

The decedent was a construction engineer who alleged asbestos exposure at various work sites in various states from 1965-92. The plaintiffs filed a Motion to Remand arguing two points: 1) the presence of the three Louisiana defendants in the matter defeated removal under the forum defendant rule, pursuant to 28 U.S.C. § 1441; 2) all defendants did not consent to the removal, in violation of the rule of unanimity, pursuant to 28 U.S.C. § 1446. Honeywell cited to four decisions in the Eastern District of Louisiana wherein the court denied motions to remand where a forum defendant had not been served at the time of removal, and the plaintiffs failed to distinguish this case from precedent.

The court analyzed the forum defendant rule and noted that the statute requires that removal be defeated "if any of the parties properly joined and served as defendants is a citizen of the State in which the action is brought." (emphasis added). Citing precedent from the Eastern District of Louisiana, the court held that removal was proper, even if a forum defendant was named, so long as it effected before the forum defendant was served with process. Similarly, the court rejected the plaintiffs' argument that the rule of unanimity required remand, because the statute requires consent only from those defendants who have been served. The court stated that the plaintiffs' interpretations of the two applicable statutes ignored the words drafted by Congress. The court stated: "…the plain language of the rule of unanimity requires that only those defendants who have been served must join in or consent to removal."

Read the full decision here.

Court's Refusal to Exercise Supplemental Jurisdiction Over Dismissed Defendant Leads to Remand

(U.S. District Court for the Eastern District of Louisiana, September 18, 2017)

The plaintiff filed this action against several defendants, including Industrial Development Corporation of South Africa, Limited (IDC), alleging he developed lung cancer from exposure to asbestos containing products for which the defendants were responsible. Immediately after the suit was filed, the plaintiff moved to dismiss claims against IDC. A co-defendant stevedoring company filed a third party complaint for contribution and/or indemnification against IDC before the court ruled on the pending motion to dismiss. IDC then removed the case to federal court. The plaintiffs moved to remand and filed a motion to dismiss IDC pursuant to Federal Rule 41(a). IDC also filed a motion to dismiss under Federal Rule 12(b)(6).

The court began its analysis by stating Rule 41 (a) permits a plaintiff to dismiss his or her claims against a defendant provided that defendant had not served an answer or moved for summary judgment. Here, it was clear IDC had not served an answer or motion for summary judgment. Accordingly, the plaintiff's motion to dismiss was granted. As for remand, the court noted that on the first removal it found IDC's status as a defendant the only "potential basis for jurisdiction in federal court." The court acknowledged that 28 U.S.C. § 1367(a) confers supplemental jurisdiction over "all other claims that are so related to claims in this action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Despite the provision, the Supreme Court has given guidance for courts to weigh certain factors when considering the exercise of supplemental jurisdiction. In fact, the discretion given to federal courts to exercise supplemental jurisdiction is broad once the remaining claims are state based. Here, IDC was dismissed. The plaintiff's claims against IDC were the only potential basis for original jurisdiction. The remaining claims were all state law claims according to the court. Relying on Section 1367 (c) and the factors set forth under *Carnegie-Mellon*, the court found that exercising supplemental jurisdiction in a case where it had little vested would not serve in the interests of judicial economy. Therefore, supplemental jurisdiction would not be exercised and remand was granted.

Read the full decision here.

Plaintiff Awarded Attorneys' Fees and Costs for Improper Removal

(U.S. District Court for the Western District of Washington, September 15, 2017)

Plaintiff Barbadin filed suit against defendants including Scapa Dryer Fabrics and AstenJohnsten, Inc. (defendants) alleging exposure to asbestos containing products for which the defendants were responsible.

Scapa removed the matter on April 17, 2017. The plaintiff quickly moved for remand and sought fees and costs. The court noted that it had previously remanded this case one time. The court concluded that Scapa had taken "inconsistent positions in an effort to keep this action in federal court" and used "untenable arguments." The court also granted the plaintiff's request for fees and costs but instructed the plaintiff to detail her fees and costs. The defendants were invited to file a reply to the plaintiff's submission on fees and costs but did not. For calculating costs, the court relied on the lodestar method which takes the hours worked multiplied by the reasonable hourly rate. An adjustment of the sum may be then determined by the court for other mitigating factors. Of course, the rate is set by the regional market rate according to the court. For the adjustment, the court may consider factors including skill level, the challenge of the work and experience of the attorney amongst others. Here, the court found that Plaintiff's submission met all reasonableness under the circumstances especially in light of the defendants filing no opposition. Accordingly, the court awarded the plaintiff attorneys' fees and costs in the amount of $7,702.50.

Read the full decision here.

Shipyard Fails to Show Nexus Required for Federal Jurisdiction

(U.S. District Court for the Eastern District of Louisiana, August 15, 2017)

Plaintiff George K. Mayeaux alleged he suffered exposure to asbestos and asbestos-containing products that were manufactured, sold, installed, distributed, and/or supplied by a number of defendant companies while employed by defendant Avondale Industries, Inc. This matter was removed to the United States District Court for the Eastern District of Louisiana. The plaintiff filed a Motion to Remand back to the Civil District Court for the Parish of Orleans in Louisiana.

The plaintiff alleged that he was employed by Avondale from 1963 to 2009. During that time, he claimed he handled asbestos and asbestos-containing products "aboard U.S. Destroyer Escorts, Lykes, and other vessels," which caused

him “to inhale asbestos dust and fibers, which led to his development of malignant mesothelioma and resultant injuries, damages, and losses.” The plaintiff brought Louisiana state law claims for negligence against Avondale and other defendants and strict liability claims against defendants other than Avondale.

Defendants Huntington Ingalls Inc. and OneBeacon America Insurance Company removed the case, alleging that removal is proper because this is action involves claims “for or relating to acts performed under color of federal office within the meaning of 28 U.S.C. § 1442(a)(1),” and “[b]ecause this Court has federal officer jurisdiction over at least one of the claims asserted by the plaintiff, it has supplemental jurisdiction over all of the plaintiff’s claims.” The plaintiff filed a motion to remand.

The plaintiff argued that remand is appropriate because Avondale has failed to satisfy all four requirements of the federal officer removal statute. The Fifth Circuit has adopted a three-part inquiry to determine whether a government contractor qualifies as a “person acting under [a federal] officer” who is sued “in an official or individual capacity for any act under color of such office.” The contractor must prove that: (1) it is a “person” within the meaning of the statute; (2) it acted pursuant to a federal officer’s directions, and a causal nexus exists between its actions under color of federal office and the plaintiff’s claims; and (3) it has a colorable federal defense to the plaintiff’s claims. The district court’s decision turned on the second factor regarding “nexus.” The plaintiff argued that Avondale cannot show that a federal officer directed or controlled their safety- and warning-related activities, or that there is a causal nexus between Avondale’s actions under color of federal office and the plaintiff’s negligence claims. In opposition, Avondale asserts that, under the current “for or relating to” language of Section 1442(a)(1), it has demonstrated that all of the breaches of duty the plaintiff alleges “relate to” Avondale’s conduct in fulfilling its contracts with the federal government for the construction of the Navy Destroyer Escorts, and therefore, the plaintiff’s negligence claims are “related to” its actions pursuant to the federal government’s directions.

The court found Avondale had not demonstrated that its own discretionary decisions to allegedly fail to warn or protect the plaintiff from the dangers of asbestos while he was employed by Avondale resulted from or is “related to” its actions under color of federal office, to the extent that any such actions exist. As such, Avondale has not shown that the necessary causal nexus exists between Avondale’s actions under color of federal office and the plaintiff’s claims. This matter was remanded to state court.

Read the full decision here.

Remand Granted Where Defendant Failed to Show Government Exercised Control Over Warnings and Safety

(U.S. District Court for the Eastern District of Louisiana, August 4, 2017)

Plaintiff Robert Templet, Sr. alleged asbestos exposure during his work for defendant Avondale Industries, Inc. The plaintiff was employed by Avondale from 1968-2002, and later developed malignant pleural mesothelioma. Defendants Avondale and Lamorak Insurance Company removed to federal court due to the federal officer removal statute. The plaintiff moved to remand. The court granted the motion and remanded this case back to the State of Louisiana.

Avondale based its removal on the plaintiff’s deposition testimony wherein he testified that they worked on Navy Destroyer Escorts and Coast Guard Cutters. During this time he worked near insulators and asbestos-containing wallboard. Avondale argued this work was done pursuant to contracts with the United States government and federal specifications. Avondale also asserted two colorable federal defenses, in that (1) the plaintiff’s claims were barred under government contractor immunity, and (2) his claims were preempted and barred by federal worker’s compensation exclusivity.

The plaintiff argued that Avondale had no support for its claims that the federal government compelled Avondale to not warn or protect him from asbestos; further, he only asserted a negligence state law claim, not a strict liability claim, and negligence claims were not within the ambit of the federal officer removal statute. The plaintiff also pointed to the affidavit of a federal ship inspector, who stated that Avondale did not work under the direction of an officer of the United States. The plaintiff cited various cases wherein the courts remanded cases with nearly identical facts and arguments. Finally, the plaintiff asserted that the federal worker’s compensation law cited by Avondale could not serve as an independent basis for removal.

The Fifth Circuit has adopted a three-part inquiry to determine whether a government contractor qualifies as a “person acting under [a federal] officer” who is sued “in an official or individual capacity for any act under color of such office.” The contractor must prove that: (1) it is a “person” within the meaning of the statute; (2) it acted pursuant to a federal officer’s directions, and a causal nexus exists between its actions under color of federal office and the plaintiff’s claims; and (3) it has a colorable federal defense to the plaintiff’s claims. In analyzing the elements of the

federal officer removal statute, the court found that the second prong was not met, because Avondale did not show that a causal nexus existed between its actions under color of federal office and the plaintiff's claims. The plaintiff only brought negligence claims against Avondale for its alleged failure to take certain safety precautions and warn the plaintiff about the dangers of asbestos. Avondale did not show that its own discretionary decisions to allegedly fail to warn or protect the plaintiff were related to its actions under color of federal office. Thus, this case was distinguishable from other cases finding that the federal government exercised some control over asbestos warnings and safety materials, rendering removal of a failure to warn claim proper. "Allowing removal of Plaintiff's claims premised on Avondale's discretionary decisions would not serve the basic purpose of Section 1442, i.e. 'to protect the Federal Government from…interference with its operations'."

Read the full decision here.

Possibility of Successor Liability Enough to Defeat Diversity Jurisdiction

(U.S. District Court, Eastern District of Pennsylvania, June 28, 2017)

The plaintiffs alleged Maynard Herman contracted mesothelioma due to occupational asbestos exposure. Defendants removed on the basis of diversity, and the plaintiffs moved to remand. The court granted the remand.

The defendants argued that defendant Ametek, Inc., although a citizen of Pennsylvania, was fraudulently joined to defeat diversity. The plaintiffs argued Ametek was not fraudulently joined because it was the successor for Mr. Herman's exposure to asbestos products made by Haveg Industries. The plaintiffs acknowledged that when Ametek purchased Haveg, the agreement facially concerned only the purchase of Haveg's assets. However, the plaintiffs correctly asserted that there were several recognized exceptions that could create successor liability for Ametek. Courts consider four factors in determining whether a transaction was a de facto merger or a mere continuation of the general business operation. These include: (1) the existence of some sort of proof of continuity of ownership or stockholder interest; (2) the cessation of the ordinary business by, and dissolution of, the predecessor; (3) the assumption by the successor of the obligations or liabilities ordinarily necessary for the uninterrupted continuation of the business; and (4) a continuity of the management, personnel, physical location, and the general business operation. All four need not exist to find successor liability.

Here, the plaintiffs produced some proof of continuity of ownership between Ametek and Haveg. Although unclear in what capacity, Haveg continued to exist. Regarding the third factor, Ametek did assume all of Haveg's accounts payable, its rights and obligations under existing contracts, its related purchase and sales orders, and its obligations regarding salary payments and vacation time for retained employees. "The aforementioned obligations are exactly the type which the Pennsylvania Supreme Court indicated would allow the continuation of business and could meet this prong." Finally, the defendants raised no real argument that the fourth factor was not met. Thus, construing all arguments against removal and resolving all doubts in favor of remand, the court concluded that defendants did not meet their heavy burden of establishing that the plaintiffs' claim of successor liability had no reasonable basis.

Read the full decision here.

Wrong Standard Applied in Remanding Case against Boiler Manufacturer to State Court; Remand Reversed

(United States Court of Appeals, Fourth Circuit June 22, 2017)

Decedent Joseph Morris worked as a shipbuilder at the Bethlehem Steel Sparrows Point Shipyard from 1948-1970s, and died of mesothelioma in 2015. The plaintiffs commenced this action in Maryland state court, and Foster Wheeler removed pursuant to government contractor immunity. The district court remanded to state court because Foster Wheeler did not make a sufficient showing that it had a colorable federal defense; Foster Wheeler appealed. The Fourth Circuit concluded that the district court applied the wrong standard for determining removability and reversed and remanded the case to the district court to determine whether Foster Wheeler's removal was timely noticed.

The plaintiffs asserted that the decedent was exposed to asbestos while working in the boiler shop. Foster Wheeler removed, stating that it made boilers for the U.S. Navy under the Navy's strict specifications, and in doing so acted under an officer or agency of the United States. Foster Wheeler submitted an affidavit from a Foster Wheeler employee who stated that the company designed boilers to match highly detailed ship and military specifications. The plaintiff filed a motion to remand and argued that Foster Wheeler's notice of remand was untimely and filed more than 30 days after Foster Wheeler learned it had a possible federal defense and it failed to meet statutory requirements, in that the specifications did not restrict Foster Wheeler's ability to warn individuals of the presence of asbestos.

A private defendant, such as a government contractor, seeking to remove a case under § 1442(a)(1), must show: (1) that it acted under a federal officer; (2) that it has a colorable federal defense; and (3) that the charged conduct was carried out for on in relation to the asserted official authority. 28 U.S.C. § 1442(a)(1).

First, there was no question that Foster Wheeler was a person acting under the Navy. "[C]ourts have unhesitatingly treated the 'acting under' requirement as satisfied where a contractor seeks to remove a case involving injuries arising from equipment that it manufactured for the government." Second, the government-contractor immunity defense had three requirements: (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 defect and failure to warn claims. Here, Foster Wheeler satisfied all three criteria. The district court applied a different standard that did not follow the established criteria, in that because the warnings Foster Wheeler could have given employees were not prohibited by the Navy, the defense did not apply. This implied that unless the government explicitly regulated all possible warnings, Foster Wheeler could not have a colorable defense. This reasoning overlooked the fact that, in specifying some warnings, the government exercised discretion in not requiring additional warnings. Further, the defense need only apply to one claim to remove the case—here the defense applied to the product liability claim with respect to the boilers themselves.

Third, Foster Wheeler established a sufficient connection between the charged conduct and the asserted official authority. The district court applied a stricter standard than that recognized by the statute.

Read the full decision here.

Denial of Remand Based on Government Directed Actions of Airplane Manufacturing Process

(U.S. District Court for the Northern District of California, June 20, 2017)

The plaintiff filed a motion to remand for lack of subject matter jurisdiction in the United States District Court in the Northern District of California. The plaintiff, Joseph Thrash, alleged he was diagnosed with mesothelioma in September 2016, and was exposed to asbestos while he worked on B-52, C-141, and C-5 airplanes in the United States Air Force from 1975 through the 1980s and while doing automotive work at various locations. The defendant, The Boeing Company, removed the case to federal court; shortly thereafter, defendants United Technology Corporation, Lockheed Martin Corporation, and The Goodyear Tire & Rubber Company filed notices of joinder in Boeing's removal notice.

The plaintiffs alleged that "Defendants placed their names, logos, and trademarks on asbestos products as well as put out as their own asbestos products manufactured by others so as to be an apparent manufacturer and liable as the manufacturer." Thrash "handled or was otherwise exposed to asbestos, asbestos containing products and/or products designed to be used in association with asbestos products." The plaintiffs alleged the defendants "specified and required the use of such original and replacement asbestos containing parts and components that were integral to their respective asbestos containing products' normal use and operation and that by design such normal use and operation directly created, generated, released and exposed [Plaintiffs] to asbestos-containing dust, debris, fiber and particulate" from those products and components, and that "as a direct and proximate result," he was exposed to the asbestos, "which increased his risk of developing the mesothelioma and asbestos disease(s) from which he now suffers."

A defendant seeking removal under Section 1442 must establish (a) that it is a "person" within the meaning of the statute; (b) that there is a causal nexus between its actions, taken pursuant to a federal officer's directions, and plaintiff's claims; and (c) that it can assert a "colorable federal defense." The plaintiffs contend the defendants have not sufficiently alleged facts to establish two requirements for federal officer removal jurisdiction, namely (i) that the acts complained of in the plaintiffs' complaint were taken at the direction of a federal officer and there is a causal nexus between the actions taken by the defendants and the plaintiffs' claims; and (ii) that the defendants can assert a colorable federal defense.

The court found the defendants established the United States military exerted direct and detailed control over their work as it relates to the plaintiffs' allegations; specifically noting, "…Defendants have established that the United States government exerted direct and detailed control over their design and manufacture of these products, the Court further finds that Defendants have established a causal nexus between Plaintiffs' claims and the acts performed by Defendants under the direction of the United States government."

In order to assert a colorable government contractor defense, defendants must show, "(1) the United States approved reasonably precise specifications; (2) the equipment [Defendants supplied] conformed to those specifications; and (3) [Defendants] warned the United States about the dangers in the use of the equipment that were known to the [Defendants] but not to the United States." The court found the defendants alleged sufficient facts, supported by affidavits and documentary evidence, to establish a colorable government contractor defense.

As a result of the court's findings, the plaintiff's motion to remand was denied.

Read the full decision here.

Defendant Fails to Establish Improper Joinder in Mesothelioma Case; Remand Granted

(U.S. District Court for the Eastern District of Louisiana, May 22, 2017)

Plaintiff Ronald Smith sued multiple defendants, including Honeywell, alleging he developed mesothelioma from occupational exposure to asbestos. Honeywell removed the case the United States District Court, arguing that the plaintiff only joined defendant Taylor-Seidenbach Inc. to defeat diversity. The plaintiff moved to remand.

The case was originally set on an expedited trial date because of the mesothelioma diagnosis. Discovery was ongoing when the plaintiff produced his work history relied upon by the plaintiff's expert, Dr. Arthur Frank. Honeywell took the position that the work history lacked mention of the plaintiff working with or around insulation. Further, the work history was absent as to the plaintiff working at a location where insulation was possibly present. Shortly after the work history was produced, Taylor served its answers to discovery propounded by the plaintiff. Taylor answered that it had nothing with respect to relationship between Smith and his employers or anything related to the plaintiff's work around joint compound or roofing products. Three days after Taylor answered the plaintiff's discovery, Smith answered discovery of Honeywell. Those answers confirmed that he lacked information as to his work around products furnished by the four Louisiana insulation contractors. Honeywell therefore argued that Taylor was improperly joined.

The court began its analysis by stating the standard for remand. The standard requires remand when "any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." The burden falls upon the removing defendant. Honeywell asserts that Taylor was only joined to defeat diversity. The two possible ways to establish improper joinder are 1) fraudulent joinder and 2) an utter inability to establish the cause of action against the allegedly wrongful joined defendant. Fraudulent joinder was not at issue according to the court. The only question to be resolved was whether the plaintiff could establish a cause of action against Taylor in state court. In order to do so, the plaintiff would have to show that "he was exposed to asbestos from the defendant's product, and that he received an injury that was substantially caused by that exposure." The plaintiff took the position that he can establish a cause of action against Taylor because of several sources of exposure which he possibly came into contact. For example, his testimony established that he worked as a roofer with asbestos shingles made by Johns Manville from 1969-1970's. Another witness corroborated that his supply company sold Johns Manville roofing materials to the roofing company. Moreover, the corporate representative for Taylor previously testified in another matter that Taylor supplied Johns Manville roofing materials to the same company for which the plaintiff had been employed. Even a newspaper advertisement from the 1970's listed Taylor as a supplier of Johns Manville products.

The plaintiff also worked at the Johns Manville and Celotex plants in Louisiana where he came into contact with asbestos from sweeping dust. Honeywell countered and argued that the plaintiff, by his own testimony, did not work at the Johns Manville Plant until after the plant had closed. Honeywell also argued the affidavit of a former employee of Taylor, relied upon by the plaintiff, did not specify where within the 75 sites the plaintiff actually worked. As for the Celotex plant, Honeywell argued that the cleanup work was also in the 1980's and did not indicate proximity to asbestos. The court disagreed with Honeywell. According to the court, the plaintiff had put forth multiple potential sources of exposure to asbestos "connected" to Taylor especially the Johns Manville roofing material. Moreover, discovery had not concluded and was ongoing.

Consequently, the court granted the plaintiff's motion for remand.

Read the full decision here.

Prior Maryland Rulings Relied Upon in Denying Remand

(U.S. District Court of Maryland, May 5, 2017)

The plaintiffs moved to remand after defendant Crane Co. removed to federal court. The court denied the plaintiff's motion without oral argument.

Decedent John Dugger served in the United States Navy during the 1960s and died of mesothelioma; the plaintiffs filed suit after his death. The plaintiffs alleged Crane manufactured and sold rope and valves to the Navy. Crane removed on the basis of the government contractor defense, and in support submitted affidavits from three individuals.

Defendants may remove to federal court if it establishes (1) the defendant is either a federal officer or acting under a federal officer; (2) a "colorable" federal defense to the plaintiff's claims; and (3) the suit is for an act under color of office, which requires a causal nexus between the charged conduct and asserted official authority. At the outset , the court noted that the Maryland district court has at least twice examined asbestos products-liability claims against Crane similar to those here, and twice denied remand. Circuit courts have done the same in allowing removal. For removal to be proper, Crane must establish a colorable, or plausible, federal defense; here, the government contractor defense. The plaintiffs claimed this defense was not plausible. However, proof of a colorable federal defense did not require the defendant to win before it was removed. Here Crane plausibly alleged the three elements of the government contractor defense; the Navy provided Crane with precise specifications; the warnings it provided conformed to federal specifications or that its failure to provide warnings was due to government regulations; and the Navy knew as much or more about asbestos hazards than Crane did. Further, Crane was acting under the direction of a federal officer, and since it established the defense, the causal nexus requirement was also satisfied. Thus, remand was denied.

Read the full decision here.

Case Remanded to Florida State Court Because Defendant Not Fraudulently Joined to Defeat Diversity

(U.S. District Court for the Southern District of Florida, March 10, 2017)

In this case alleging asbestos exposure from talc, mesothelioma plaintiff filed a motion to remand back to Florida state court after defendant Johnson & Johnson removed to federal court based upon diversity jurisdiction. The defendant argued that the plaintiff fraudulently joined defendant Publix Super Markets, Inc. (Publix) to destroy diversity. The court determined Publix was not fraudulently joined and remanded.

In determining remand, the court must evaluate the factual allegations in the light most favorable to the plaintiff. If there is even a possibility that a state court would find that the complaint states a cause of action against any one of the resident defendants, the federal court must find that joinder was proper. Here, the plaintiff asserted a cause of action against Publix for negligence. Johnson & Johnson argued there was no possibility that the plaintiff could state this cause of action, because based upon the declaration of Cynthia Roberts, "category manager" for Publix, Publix sold finished talcum products but otherwise had no control over the manufacture of same. However, this declaration did not address what Publix should have known, upon which the negligence claim was also based. Viewed in the light most favorable to the plaintiff, these allegations, which were not refuted, were sufficient to establish the possibility that the plaintiffs may state a claim for negligence against Publix.

However, because Johnson & Johnson had a reasonable basis for removal, the plaintiffs were not entitled to fees and costs.

Read the full decision here.

Federal Court Denies Defendants' Motion to Dismiss on Jurisdiction Without Prejudice

(U.S. District Court for the Middle District of Florida, Tampa Division, January 12, 2017)

On September 26, 2016, Plaintiff Marc Killam filed suit in the Thirteenth Judicial Circuit in and for Hilsborough County, Florida against various defendants after learning of his asbestosis diagnosis. Killam alleged he was exposed to asbestos through his Naval Service, from 1973-77 aboard the USS McCandless while at sea and in the Philadelphia Navy Yard. Here, Killam claims a number of defendants manufactured, sold, distributed, installed, or promoted the asbestos products with which he came into contact. He also alleged, that from 1978-80, as an auto mechanic, he breathed asbestos dust emanating from products manufactured by additional defendants.

The defendants removed the case to the U.S. District Court for the Middle District of Florida, Tampa Division on October 13, 2016 pursuant to 28 U.S.C. §§ 1442(a)(1) and 1446. Killam sought an order of remand which was denied. The defendants then filed a motion to dismiss on a variety of substantive and procedural grounds and argued that the court lacked personal jurisdiction, and subsequently, sought dismissal under *Rule 12(b)(2). Fed. R. Civ. P.* Under *Rule 12(b)(2)*, a plaintiff seeking to assert personal jurisdiction over a nonresident defendant bears the initial burden of alleging in the complaint sufficient facts to make out a prima facie case of jurisdiction. A prima facie case is established if the plaintiff presents enough evidence to withstand a motion for directed verdict. In the current case, the court noted that because the complaint was filed in state court and Killam presumably did not anticipate removal predicated upon federal officer jurisdiction, the complaint is devoid of factual allegations to satisfy *Rule 12(b)(2)* or other federal requirements (such as constitutionally minimum contacts and due process concerns of fair play and substantial justice).

Accordingly, the court agreed that the plaintiff's complaint, as pled, did not contain sufficient factual allegations regarding personal jurisdiction. However, because the complaint was plucked from state court and thrust into the federal forum, the court *sua sponte* granted Killam the opportunity to file an amended complaint by January 30, 2017, containing specific allegations that provide the court with a basis for exercising personal jurisdiction over each named defendant. The court further noted that in the instance any defendant wishes to challenge the assertion of personal jurisdiction in response to the amended complaint, that the defendant should provide specific arguments and attach an affidavit to the motion to dismiss.

In addition to this decision, the court mentioned some guiding principles for Killam moving forward which included the following: (1) Federal Rule of Civil Procedure 8 requires that a complaint contain a short and plain statement of the claim demonstrating that the plaintiff is entitled to relief; (2) Rule 9(b) provides that in allegations of fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake; and (3) in preparing his amended complaint, and particularly with respect to any fraud claims, Killam is instructed to provide specific allegations giving each defendant notice of the conduct in question that may entitle Killam to relief. Killam is not permitted to "lump" all defendants together in "boundless, amorphous general allegations of fraud.

Read the full decision here.

Other Remand/Removal Decisions:

- **Bare Metal**
  - **Summary Judgment Recommended for Naval Boiler Manufacturer on Issues of Product Identification and Bare Metal Defense**
    (U.S. District Court for the District of Delaware, August 21, 2017)
- **Federal Officer Jurisdiction**
  - **Insulation Used On Nuclear Prototype "Ordinary Consumer Product" and Not Subject to Military Contractor Defense**

(U.S. District Court, Central District of California, August 21, 2017)

- **Federal Court Defines "Other Paper" in Removal Statute § 1446U.S. District**
  (U.S. District Court for the Middle District of Louisiana, June 21, 2017)

- **Timely Removed Take-Home Exposure Case Remanded for Failure to Establish Colorable Federal Defense**
  (U.S. District Court for the Eastern District of Louisiana, June 19, 2017)

- **Pleadings Challenge**

  - **Appellate Court Affirms Dismissal in Federal Court Without Prejudice; Allows Plaintiffs to Refile in State Court**
    (U.S. Court of Appeals for the Ninth Circuit, March 9, 2017)

Statute of Limitations Decisions

Plaintiff's FELA Claim Against Railroad Survives Limitations Challenge

(Supreme Court of Montana, November 14, 2017)

The plaintiff worked for Burlington Northern and Santa Fe Railway Corporation (BNSF) and claimed exposure to amphibole containing vermiculite in that capacity as BNSF transported vermiculite for W.R. Grace. The plaintiff filed suit against BNSF for his asbestos related disease under FELA. The trial court granted summary judgment for the defendant and the plaintiff appealed.

Prior to the suit, W.R. Grace filed for bankruptcy protection in 2001. A temporary restraining order (TRO) was immediately issued prohibiting any suits against third parties arising from W.R. Grace's mining operations. The court entered a preliminary injunction in 2001, which stayed all actions pending or not filed. Years later, W.R. Grace moved to enlarge the language of the injunction to include claims arising from its mining operations, e.g., those against BNSF. The motion was granted in 2008. The instant suit was filed against the state and wood product defendants in 2010. The District Court granted summary judgment, stating the plaintiff's claims accrued on October 22, 2007 and were therefore barred by the statute of limitations.

On appeal, the plaintiff argued that the time for filing should be tolled because of the earlier injunction staying his claims against BNSF. On the other hand, BNSF argued that the stay only suspended claims against it for mining operations and did not stay the filing of new claims. Reviewing the language of the injunction, the court disagreed with BNSF. Specifically, the court noted that the term "commencement" of new actions had been included in the expansion of the injunction. Accordingly, the plaintiff's claim was within the three FELA statute of limitations.

Read the full decision here.

Brake Manufacturer's Motion for Summary Judgment Granted Based on Statute of Limitations

(Superior Court of Delaware, August 29, 2017)

The plaintiff brought suit in Delaware contending that David Bagwell contracted lung cancer from Pneumo Abex's products. Bagwell was diagnosed in May 2009 and passed away from cancer on January 28, 2010. Plaintiff contacted an attorney regarding this matter in August or 2012. This matter was ultimately filed on June 2, 2014. Under South Carolina law, the defendant argues that the plaintiff's case must be dismissed because wrongful death claims must be filed within three years of the date of the decedent's death. However, Delaware law states that when a cause of action arises outside of Delaware, an action cannot be brought in Delaware to enforce such cause of action after the expiration of whichever is shorter, the time limited by the law of this State, or the time limited by the law of the state… where the cause of action arose. The plaintiff argues that under Delaware law, "[t]he two-year

statute of limitations on asbestos-related personal injury cases 'begins to run when the plaintiff is chargeable with knowledge that his condition is attributable to asbestos exposure'." The four part test relevant to determine whether the statute of limitations runs is: (1) plaintiff's knowledge and education; (2) the extent of his recourse to medical evaluation; (3) the consistency of the medical diagnosis; and (4) plaintiff's follow up efforts following the initial recourse to medical evaluation.

The court noted that the plaintiff's argument was correct that Delaware's statute of limitations law in latent disease cases provides relief for plaintiffs by starting the legal time clock from the date a plaintiff is "chargeable with knowledge that his condition is attributable to asbestos exposure," However, the plaintiff provided nothing for the court to analyze a statute of limitations date. Based on such a lack of evidence, the court could not infer, beyond speculation, that Ms. Bagwell became chargeable with knowledge that her husband's disease was asbestos related was August 2012. Accordingly, Pneumo Abex's motion for summary judgment was granted.

Read the full decision here.

"Discovery Rule" Applied for Plaintiffs' Claim to Survive Two-Year Statue of Limitations

(U.S. District Court for the Eastern District of Pennsylvania, March 2, 2017)

The plaintiffs asserted that the decedent, Joseph Conneen, was exposed to asbestos while working as a pipefitter and plumber from 1962-80 at the Philadelphia Naval Shipyard and Rohm and Haas. The decedent died of lung cancer. The complaint was filed on January 20, 2015. In March 2015, the case was removed to the U.S. District Court for the Eastern District of Pennsylvania as part of MDL-875. Defendant Goulds moved for summary judgment on the basis of Pennsylvania's two-year statute of limitations. The court denied this motion.

The plaintiffs provided an affidavit summarizing the events surrounding Mr. Conneen's diagnosis and discovery of asbestos as a potential cause of his lung cancer. Although the decedent was diagnosed in December 2012, he did not discover asbestos as a potential cause until February 12, 2013. Although discovery was allowed on the statute of limitations issue, including a potential deposition of Mr. Conneen, he was never deposed and the defendants relied exclusively on his December 2012 medical records.

At the outset the court noted that the plaintiffs alleged both land-based (state law applied) and on-ship (maritime law applied) exposures. The outcome was the same, regardless of whether state or maritime law applied.

Under Pennsylvania law, the statute of limitations for an asbestos-related injury was generally two years from the date on which a claim may be brought. Pennsylvania employed the "discovery rule" in cases where an injured party was unable to know of both (1) the fact of injury and (2) the cause of that injury. This rule may apply in cases of asbestos-related disease, where there is not an immediate and obvious causal link between a diagnosis and exposure to asbestos. Pennsylvania also allowed a tolling of the statute through the "doctrine of fraudulent concealment," even in situations of unintentional deception. Under both rules, the plaintiffs must have undertaken "reasonable diligence" in timely bringing an action. The court analyzed various Pennsylvania Supreme Court cases in which the court analyzed what constituted "reasonable diligence."

Under maritime law, the statute of limitations was three years after the cause of action arose. Causes of action accrued when a plaintiff had a reasonable opportunity to discover his injury, its cause, and the link between the two.

The defendant argued the plaintiffs' claims were barred because medical records supported that Mr. Conneen knew of his lung cancer diagnosis and had discussed with his doctors his asbestos exposures. Further, Mr. Conneen was not diligent in attempting to discover the cause of his lung cancer; the fact that he never smoked should have heightened his inquiry. The plaintiffs argued Mr. Conneen was reasonably diligent in inquiring about the cause of his lung cancer since he determined within two months of his diagnosis that asbestos may have been a cause. Further, none of his doctors advised him that asbestos may have been a cause. In support, the plaintiff provided an affidavit of Mr. Conneen stating that he first learned asbestos may have been a cause during a February 12, 2013 meeting with his doctor, in which he inquired about the cause.

The court found that under maritime law, defendant's motion should be denied because the statute of limitation was three years. Under Pennsylvania law, the motion is also denied. First, although defendants rely on one medical record from December 18, 2012, mentioning a history of asbestos exposure, there was no indication that this document was ever provided to Mr. Conneen, or that this issue was ever discussed with Mr. Conneen. A subsequent letter from one of his doctors denied any worrisome asbestos exposures. Five separate physicians involved in Mr.

Conneen's care were aware of his asbestos exposure, but according to Mr. Conneen, none of them informed him that asbestos may be a cause until February 12, 2013.

Second, the court could not say that Mr. Conneen did not act with reasonable diligence. Contrary to previous cases analyzed by Pennsylvania courts on this issue, it took less than two months from the date of his diagnosis for Mr. Conneen to discover the potential link between his lung cancer and asbestos exposures. Further, the court could not conclude that the doctrine of fraudulent concealment applied to toll the statute, as there was no evidence that decedent's doctors acted as agents for defendants to unintentionally deceive Mr. Conneen by concealing his potential claim.

Read the full decision here.

Other Statute of Limitations Decisions:

- **Maritime**
    - **"Discovery Rule" Applied for Plaintiffs' Claim to Survive Two-Year Statue of Limitations**
      (U.S. District Court for the Eastern District of Pennsylvania, March 2, 2017)

Statute of Repose Decisions

Maryland Court Affirms Application of Statute of Repose in Asbestos Matter
(Court of Special Appeals of Maryland, May 31, 2017)

On December 13, 2013, plaintiff James F. Piper was diagnosed with mesothelioma and filed suit in the Circuit Court for Baltimore City on March 26, 2014 for damages caused by his occupational asbestos exposure. Piper worked as a steamfitter at the Morgantown Generating Station in Woodzell, Maryland. In early 1970, defendant Westinghouse installed a turbine generator at this site to which the specifications called for the use of insulation containing asbestos. Piper testified that while he did not work directly on the installation of the turbine generator, he worked in the vicinity of the workers installing the turbine generator's insulation. The last day of work on the turbine generator was June 28, 1970 and it was operational in July of that same year.

On January 9, 2015, Westinghouse filed a motion for summary judgment, alleging that Piper's cause of action against it was barred by the statute of repose. The circuit court granted the motion and Piper appealed.

The primary issue on appeal was whether Piper's claim against Westinghouse was barred by the statute of repose under CJP § 5-108, which is an issue of law. It was undisputed that (1) the last date of Piper's exposure to asbestos dust from the installation of insulation on the relevant turbine generator was prior to June 28, 1970; (2) the turbine generator, which was fabricated and installed by Westinghouse was substantially completed no later than July 1970; and (3) Piper was diagnosed with mesothelioma on December 26, 2013.

The Statute of Repose in Maryland, under *CJP § 5-108*, states in relevant part:

(a) Injury occurring more than 20 years later: No cause of action for damages accrues and a person may not seek contribution or indemnity for damages incurred 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 20 years after the date the entire improvement first becomes available for its intended use.

(e) When action accrues: A cause of action for an injury described in this section accrues when the injury or damage occurs.

On appeal, Piper contended, among other things, that the circuit court erred in retroactively applying the statute of repose to bar his cause of action because the because his injury "arose" on June 28, 1970, and the session law that passed the original statute of repose contained language indicating that the statute does not apply to injuries arising

on or before June 30, 1970. Piper conceded that his injury "accrued" in 2013 when his injury was discovered but argued that the date of accrual was irrelevant. Piper argued that the statute of repose could not be applied retroactively to him, "because subsequent revisions and amendments to the statute lack a 'clear expression' in favor of retroactivity."

The Court of Special Appeals of Maryland addressed Piper's argument distinguishing the terms accrue and arose, by finding, although this argument is correct today for asbestos cases, it could not be grafted onto the Legislature's intent in 1970 when the statute of repose was passed because those terms had not yet been distinguished. Therefore, because of the history, language and intent of the statute, the court concluded that the term "arising" carried the same meaning as the term "accruing" (regarding the date the injury was discovered). Accordingly, this would not bar the application of the statute of repose barring Piper's claim.

The defendant's motion for summary judgment based on the statute of repose was affirmed.

Read the full decision here.

Dissolved Company Failed to Meet Notice Requirements of Statute of Repose

(Superior Court of Rhode Island, March 13, 2017)

Defendant Grover S. Wormer Company, individually and as successor-in-interest to Wright-Austin Company, brought a motion to dismiss the asbestos litigation filed on behalf of Frank D'Amico in the Superior Court of Rhode Island, Providence. Wormer originally brought its motion under Super. R. Civ. P 12(b)(6) and contended that the plaintiff's claims for liability are barred under Michigan's Business Corporation Act Chapter 8 (the BCA), which governs the dissolution of corporations and provides a Statute of Repose to bar continued liability. The plaintiff did not contest the applicability of the BCA, however, the plaintiff contended that Wormer did not provide sufficient discovery for the court to resolve the applicability of the Statute of Repose.

The defendant was incorporated in the State of Michigan, with its principal place of business in Michigan during the years of its incorporation. The defendant manufactured certain "steam, water compressed air and gas traps" which were used in catapult systems. On May 15, 1997, a Certificate of Amendment to the Articles of Incorporation changed the company's name to "Grover S. Wormer Company." On January 28, 2008, Wormer was dissolved "in accordance with the Michigan Corporation Code." The defendant maintained that the plaintiff's claims should be dismissed because a Michigan statute of repose bars suits against dissolved companies that are filed more than one year after dissolution.

The plaintiff countered that this motion should be converted to a summary judgment motion since the defendant relies on documents outside the complaint, namely, the affidavit of Christiansen von Wormer detailing the company's dissolution in 2008. The plaintiff argued that summary judgment is premature at this stage since she has not had sufficient opportunity to conduct discovery on the case and that the defendant has documents necessary to oppose this Motion in its sole custody and control.

Rhode Island's Superior Court Rule of Civil Procedure 12(b) states that when "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56. The court treated Wormer's motion as one for summary judgment because both the defendant and plaintiff referenced the content of an affidavit in support of their arguments. Pursuant to Super. R. Civ. P. 56(c), "[s]ummary judgment is appropriate when, viewing the facts and all reasonable inferences therefrom in the light most favorable to the nonmoving party, the court determines that there are no issues of material fact in dispute, and the moving party is entitled to judgment as a matter of law." (Citation omitted)

The plaintiff argued that under the Michigan BCA, in order for the statute of repose to apply and bar all claims, a corporation must dissolve and then provide proper notice to all potential claimants. After proper notice is made and the required time period has elapsed, only then can the statute of repose apply. As stated in the statute of repose itself, the Michigan statute of repose will only apply to bar claims if required procedures are followed, including notice to interested parties and potential claimants. The affidavit provided by the defendant in support of its motion did not contain any details on how the corporation was dissolved or whether the corporation provided any notice at all to current or potential claimants. As such, the court found the defendant failed to establish an absence of genuine issues of material fact in respect to the applicability of Michigan's Statute of Repose and compliance with notice requirements and denied Wormer's motion for summary judgment.

Read the full decision here.

Rhode Island Court Applies Maine Law to Deny Summary Judgment to Insulation Contractor

(Superior Court of Rhode Island, March 13, 2017)

The plaintiffs alleged negligence and breach of warranty based upon asbestos exposure sustained by decedent during his work at various job sites through the Laborer's Union from 1969-1990. Defendant New England Insulation Company (NEI) filed a motion for summary judgment based upon various theories, which the court denied. During his deposition, the decedent testified that he worked as a laborer for general contractors at job sites in Maine. From 1973-1976 he worked at International Paper Mill around other trades, such as pipefitters and insulators. His brother and co-worker also testified as to the decedent's work at the paper mill during this time. Another co-worker testified that NEI was the insulation contractor at this site and installed pipe covering.

First, NEI argued that the law of Maine should not apply, because the plaintiffs did not follow Rhode Island rules requiring notice when parties intend to apply foreign law. The court found that the plaintiffs did provide notice because they gave a choice-of-law argument in their objection to NEI's motion for summary judgment. The court then performed a choice of law analysis, finding a true conflict in the Maine and Rhode Island statutes of repose. Rhode Island's statute of repose was much broader.

After finding a conflict, the court weighed the interest of both states to find which had the most significant relationship. Overall, Maine's contacts made it the better choice of law because this is where the relationship between decedent and NEI was centered. Thus, the court applied the substantive law of Maine to NEI's summary judgment motion. The Maine Supreme Court recently held that "in asbestos personal injury matters, Maine law requires evidence demonstrating that the asbestos containing product originated with the defendant as a prerequisite to product identification and liability." Based on this rationale, the court only reviews a plaintiff's exposure evidence to a defendant's original product. Here, the plaintiffs alleged exposure from the installation of asbestos-containing pipe covering and provided evidence with historical documents and testimony to support their claims. The court found that the plaintiffs met their burden to overcome summary judgment, and continued on to analyze whether an issue of fact remained regarding plaintiffs' allegation that NEI's conduct or product caused them damages. In doing so, the court applied the frequency, regularity and proximity standard to find that the plaintiffs overcame this burden as well. Finally, since NEI argued for summary judgment under Rhode Island's statute of repose, and not Maine's, the court found that under Maine's statute of repose the plaintiffs' claims were not barred.

Read the full decision here.

Summary Judgment Decisions

Summary Judgment Reversed Against Gasket Defendant Despite Contradictory Declaration

(Court of Appeal of California, First Appellate District, Division Two, December 22, 2017)

The plaintiffs filed suit against dozens of defendants, including Familian Corporation, alleging that Mr. Turley developed an asbestos related disease for which defendants were liable. Specifically, Mr. Turley alleged that he was exposed to asbestos containing cement pipe, pipe collars, gaskets and elbows made by Familian while working at various Pacific Gas and Electric Company locations.

Familian moved for summary judgment. The plaintiffs filed an opposition with a declaration from a witness, Paul Scott, who had not been deposed. The declaration implicated Familian as a product to which Mr. Turley had been exposed. The declaration, along with other discovery matters, became the subject of alleged "sharp" discovery practices lodged by both sides. For purposes of summary judgment, the court noted that the discovery issues were not germane to its decision. Mr. Scott was subsequently deposed. His deposition testimony veered off course from his declaration according to Familian. The trial court agreed and granted summary judgment in favor of Familian. The plaintiffs appealed.

The court began its analysis and stated that the exposure standard requires that the "plaintiff must first establish some threshold exposure to the defendants' defective asbestos-containing products, and must further establish in reasonable medical probability that a particular exposure or series of exposures was a "legal cause" of his injury, i.e., a substantial factor in bringing about the injury." Familian argued that the plaintiffs' discovery responses were lacking with regard to the exposure issue. However, the court concluded that Familian had not included in its argument that the responses did not state that any exposure that may have occurred had not contributed to Mr. Turley's injury. Further, the court discussed the decision from the *Lineweaver* case as comparative to the instant appeal. Like *Lineweaver*, circumstantial evidence rather than direct exposure evidence was put forth. Here, Mr. Scott's testimony established that Familian's asbestos gaskets were "frequently used at Mr. Turley's worksite throughout the five years that Mr. Scott was the person ordering, procuring and distributing such products to the sites and that Mr. Turley used them." As for the declaration submitted below, the court noted that the trial court relied upon the *D'Amico* decision whereby a subsequent contradictory declaration may render the grant of summary judgment. However, the court stated that the plaintiffs correctly argued that the reverse had occurred. Here, the declaration was submitted prior to the deposition testimony. The plaintiffs argued this position below. According to the court, Familian had not responded to this argument. In conclusion, the trial court's application of the *D'Amico* decision was in error. Finally, the court concluded that Mr. Scott's testimony was not contradictory with his declaration in several areas. His testimony established that "defendant's product was definitely at his work site and that it was sufficiently prevalent to warrant an inference that plaintiff was exposed to it." Accordingly, summary judgment was reversed.

Read the full decision here.

Plaintiff's Testimony about Secondary Brake Exposure Sufficient to Overcome Summary Judgment

(U.S. District Court, Northern District of Ohio, Eastern Division, December 13, 2017)

Plaintiff Julia Alexander filed suit against multiple defendants after she was diagnosed with peritoneal mesothelioma in May of 2016. The plaintiff alleges that she was exposed to asbestos via Bendix brake products which were manufactured by Honeywell International. The plaintiff testified that she visited her fiancé, an automobile mechanic, two to three times per week for four hours a visit from 1987-91. Throughout this period, the plaintiff alleges she observed her fiancé performing brake work on a variety of vehicles one to three times per week. The plaintiff identified Bendix as the only brand of replacement brakes her fiancé used, and testified during her deposition that she was within five feet of him while he was working.

The proper summary judgment analysis under Fed.R.Civ.P. 56(c) and multiple case opinions entails "the threshold inquiry of determining whether there is the need for a trial—whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party."

The Ohio Revised Code, Section 2307.96(B) sets forth the applicable burden of proof in asbestos tort claims: "A plaintiff in a tort action who alleges any injury or loss to person resulting from exposure to asbestos has the burden of proving that plaintiff was exposed to asbestos that was manufactured, supplied, installed, or used by the defendant in the action and that the plaintiff's exposure to the defendant's asbestos was a substantial factor in causing the plaintiff's loss or injury." Similar to other states, the trier of fact must consider the manner in which the plaintiff was exposed, the proximity to defendant's product, the frequency and length of the plaintiff's exposure, and any mitigating or enhancing factors of exposure.

The court held that even in light of some "imprecise and even conflicting testimony in the record of this case," the plaintiffs presented sufficient evidence upon which a jury could find that asbestos-containing Bendix brake products were a substantial factor in plaintiff's injury, if they find her testimony credible. Honeywell provided evidence that might be useful for cross-examination at trial, but "this only shows the existence of a question of material fact which precludes summary judgment in either party's favor." The plaintiff's testimony identified Honeywell's product and sufficient evidence for a jury to determine the manner, frequency, length of exposure, and enhancing factors relevant to a determination as to whether Bendix brakes were a substantial factor in her contraction of mesothelioma.

The court denied Honeywell's motion for summary judgment and also denied the plaintiffs' motion to amend the order allowing the defendant 90 days after the court's ruling on summary judgment to produce expert reports.

Read the full decision here.

Summary Judgment Granted for Ford on Strict Liability, Punitives, and Conspiracy Claims

(U.S. District Court, District of Delaware December 12, 2017)

Asbestosis plaintiff Gerald Hickman alleged take home, bystander, and direct exposure to asbestos from, among others, defendant Ford Motor Company. Ford moved for summary judgment, which was granted in part and denied in part.

The plaintiff alleged exposure to Ford products during his work around others in garages and gas stations, from his father's work in the family service station, and from his own repair work on his wife's new Ford Mustang. Applying Delaware law, the court denied summary judgment as to the negligence and duty to warn claims, finding that the plaintiff's work on original factory installed brakes that Ford knew contained asbestos presented a sufficient product nexus to defeat summary judgment.

In granting summary judgment for Ford on punitive damage claims, the court noted that the plaintiff failed to produce any evidence that Ford's conduct was willful, wanton, or reckless. As to strict liability, the court stated: "Delaware courts have refused to extend strict liability to cases involving the sale of a product even where it is alleged that the product is inherently dangerous." The plaintiff cited no legal argument to the contrary. Finding that Ford had "no agreements with any other defendants to suppress knowledge of the dangers of asbestos, or that they intentionally marketed their asbestos products without effective warnings," the court granted Ford summary judgment as to conspiracy claims.

Read the full decision here.

No Reasonable Inference that Union Carbide Supplied Asbestos to Joint Compound Manufacturers; Summary Judgment Granted

(Superior Court of Delaware, December 11, 2017)

Plaintiff Larry Sturgill, who died of mesothelioma, worked in home remodeling and construction for three years, using joint compound manufactured by three companies. Defendant Union Carbide moved for summary judgment, which the court granted.

U.S. Gypsum and National Gypsum, were allegedly supplied with Calidria asbestos for their joint compound products by Union Carbide. Virginia substantive law governed the case. Union Carbide argued that 1) the plaintiff could not establish that he worked with any joint compound containing Calidria, 2) that a bulk supplier of raw material to a sophisticated manufacture has no duty to end users for dangers associated with the manufacturer's end product, and 3) if a duty existed, there was insufficient causation.

Factually, Union Carbide argued it did not sell Calidria to the facility responsible for supplying U.S. Gypsum joint compound to the region where the plaintiff lived. They further argued that they were generally a minor supplier of asbestos to National Gypsum. The plaintiff argued that Union Carbide estimated that Calidria asbestos represented 50 percent of the total amount of asbestos in joint compound in the U.S. in the 1970s. The plaintiff tried to persuade the court that Union Carbide could not assert a bulk supplier defense because they claimed that Union Carbide concealed the hazards of Calidria from customers, and a jury could reasonably conclude that the plaintiff's exposure to Calidria was a proximate cause of his mesothelioma.

The court noted that summary judgment would not be granted if there was a material fact in dispute, but the motion must be decided on the record presented and not on "evidence potentially possible." After reviewing documents evidencing Union Carbide's Calidria supply history, the court stated: "(i)f Union Carbide was simply one of several suppliers of asbestos to joint compound manufacturers, it cannot reasonably be inferred that the asbestos to which Mr. Sturgill was exposed was supplied by Union Carbide." In supporting its decision to grant summary judgment for Union Carbide, the court stated that the plaintiff did not rebut Union Carbide's contention that it did not supply Calidria to the facility responsible for supplying U.S. Gypsum joint compound to the region where the plaintiff lived. Further, Union Carbide was not an exclusive supplier to the plant responsible for supplying National Gypsum to the plaintiff's region.

Read the full decision here.

Summary Judgment Affirmed in Delaware Maritime Action Based Upon Lack of Product Identification

(Superior Court of Delaware, November 29, 2017)

In an unreported opinion issued on November 29, 2017, the Superior Court of Delaware affirmed the entry of summary judgment on behalf of Warren Pumps. The plaintiff, Phillip Walsh, served aboard the USS Halsey and USS Bigelow from 1975 to 1977 as a machinist in the U.S. Navy. He was the only product identification witness offered. He testified that he removed insulation from pumps, and also removed and installed packing and gaskets on the pumps. With regard to the manufacturer of those replacement products, he stated that "depending on the pump, if it was Gould or, you know, Warren or some of the names that I mentioned before, it would have been those."

The court found the plaintiff's general testimony about replacement parts insufficient to withstand summary judgment under maritime law. Specifically, the court stated that the plaintiff could not identify a specific pump manufactured by Warren, how often he worked with Warren pumps, or the maintenance history of the Warren pumps on board the ships. Given that lack of proof, summary judgment was affirmed.

Read the full decision here.

Summary Judgment Affirmed in Favor of Insulation Suppliers Based Upon Lack of Product Identification

(Circuit Court for Baltimore County, November 20, 2017)

The Circuit Court for Baltimore County affirmed the entry of summary judgment for two insulation suppliers-installers in a mesothelioma case arising from Bethlehem Steel's Key Highway Shipyard (KHS), agreeing that the plaintiffs failed to present evidence linking the plaintiff to the products or employees of the insulation defendants. The evidence demonstrated that MCIC, Inc. (formerly the McCormick Asbestos Company) and Wallace & Gale Settlement Trust (formerly the Wallace & Gale Company) both supplied and installed insulation at KHS during the plaintiff's years of employment at the shipyard.

A co-worker testified that the plaintiff worked on all the ships at KHS, but during oral argument, the plaintiff's counsel conceded that this testimony meant the plaintiff worked on most of the ships, not all of them. Other co-workers testified about the prominence of the various insulation suppliers-installers at KHS, but there was no evidence demonstrating that either products or employees of McCormick or Wallace & Gale were in plaintiff's presence on a particular ship. Specifically, the court stated "[t]he Appellants put on no evidence addressing whether, if McCormick or W&G were performing work on the same ship as Mr. Davenport, they were working in the same location or at the same time. Based upon the evidence presented, there is simply no way, absent sheer speculation, to reach the inference suggested by the Appellants." Finding the evidence did not meet the applicable regular, proximate and frequent product identification standard, the Circuit Court affirmed the entry of summary judgment for McCormick and Wallace & Gale.

Read the full decision here.

Plaintiff's Failure to Establish Causation and Lack of Opposition Leads to Grant of Summary Judgment

(U.S. District Court for the Western District of Kentucky, October 27, 2017)

Rojelio Surita brought this action against several defendants alleging his decedent, Nancy Surita, developed mesothelioma from exposure to asbestos containing products for which Defendants were liable. Nancy Surita gave deposition testimony stating that she assisted in brake jobs on the family farm while growing up in Illinois. She also recalled maintenance on vehicles while serving in the National Guard. Later she testified as to working on military trucks. Although she recalled Caterpillar as the manufacturer of the transmissions, she testified that she did not perform transmission work. As for the brakes, she was unable to recall the brands of the removed or replacement brakes. Caterpillar removed the case to the United States District Court. The defendants moved for summary judgment. The plaintiff filed no opposition.

The court reviewed the standard for summary judgment and stated that summary judgment " is appropriate when the record, viewed in the light most favorable to the nonmoving party, reveals there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Of course, the burden falls upon the party seeking summary judgment. And where a party fails to file an opposition, the moving party still must establish the plain language of the rule for summary judgment. The motions filed by the defendants all made the same argument that the plaintiff had failed to establish causation as there was nothing establishing that defendants' products were a substantial factor in causing Ms. Surita's mesothelioma. Certain defendants also moved for summary judgment as to the plaintiff's claims on misrepresentation as moot. In analysis of the facts, the court concluded that the plaintiff must show that the "product of each defendant was a substantial factor in bringing about" the illness. Although the complaint made those allegations, the plaintiff did not illustrate how those products "probably caused" the illness. The court also noted that he did not file an opposition to establish the same. Relying on the *Moeller* case, the court analyzed another similar case whereby exposure to another product may have caused the plaintiff's illness as opposed to establishing that the exposure "probably" caused the illness. From that case, the court noted the distinction between what may have caused and probably caused and concluded that the plaintiff had not established substantial factor as to any of the defendants. Accordingly, summary judgment was granted as to the moving the defendants. Further, the plaintiff's claims for misrepresentation also failed as a derivative from lack of causation. Finally, the plaintiff's count for punitive damages and loss of consortium were denied as moot.

Read the full decision here.

Plaintiff's Status as Independent Contractor Bars Negligence Claim

(Superior Court of Delaware, October 26, 2017)

Defendant Covestro was the premises owner or successor in interest to one or more prior owners of Mobay Chemical Plant. The plaintiff worked at Mobay for six months in 1979 and was employed by Dravo Corporation, a third party contractor. The plaintiff testified that he removed insulation from pipes and other equipment; he received instruction and equipment from Dravo supervisors. The plaintiff also worked at Mobay from 1986-88 as a contract engineer for Midwest Tech and testified that he reported to two Mobay employees and removed insulation on valves. The plaintiff was hired full-time by Mobay in 1988 and remained there until 2014.

The parties stipulated that any injury sustained after 1988 was barred under West Virginia's worker-compensation statute. Covestro argued that the plaintiff provided no credible or admissible evidence that the insulation the plaintiff allegedly handled prior to 1988 contained asbestos. The plaintiff countered that at least eight bankrupt manufacturers of asbestos-containing products list Mobay as a "conceded site" for purposes of claims against their estate.

Covestro further argued that even if the court found the plaintiff presented sufficient evidence to create a genuine issue of fact regarding asbestos exposure, the plaintiff's claims were barred under West Virginia law. Under West Virgina law, the "occupier of premises employing an independent contractor has the duty of providing a reasonably safe place to work," which includes the "duty to warn of latent defects existing before the work is started that are known to the employer, but are not readily observable by the employee." The law also states that "the employer of an independent contractor will also be liable to such contractor's employee if he retains some control or supervision over the work which negligently injures the employee" or when the injury was "caused by the negligence of the employer." Covestro argued that there was no evidence in the record to show that it was negligent or otherwise in control over the work. The plaintiff argued that evidence of asbestos exposure alone creates a genuine issue of material fact as to the negligence claim against Covestro.

When "determining whether a workman is an employee or an independent contractor, the controlling factor is whether the hiring party retains the right to control and supervise the work to be done." The court granted Covestro's Motion for Summary Judgment, holding that since the plaintiff worked for a third party at the plant prior to becoming a full-time employee and received instruction from the third party, there was no evidence that Covestro engaged in negligent conduct to be held liable for the plaintiff's injuries.

Read the full decision here.

Plaintiff's Incomplete Deposition Testimony Deemed Inadmissible; Summary Judgment Granted for Defendant

(U.S. District Court for the Northern District of Ohio, Eastern Division, October 19, 2017)

The decedent, Donald French, filed suit as a result of his diagnosis of mesothelioma allegedly caused by occupational exposure from asbestos-containing products through his work at U.S. Steel in Dearborn, Michigan. French provided testimony as to his alleged exposures at a discovery deposition that lasted approximately 18 hours over three days. On the third day, French identified the defendant as a source of exposure. The deposition, however, was not completed. The fourth day of deposition was adjourned due to French's poor health. French passed away shortly thereafter and the deposition was never completed. The defendant acknowledges, during the relevant time period, that it did manufacturer and sell products that contained asbestos. However, there was no other evidence in this case connecting defendant to French or U.S. Steel.

The defendant subsequently filed motions to strike and exclude the plaintiff's deposition testimony and for summary judgment. The defendant argued this testimony could not be admitted when there is no reasonable opportunity to cross-examine the witness on the subject topic and the admission of this testimony would be a violation of defendant's basic protections of the Confrontation Clause of the Sixth Amendment to the United States Constitution. The plaintiff opposed.

Both parties agreed that the defendant was present at French's deposition and that Fed. R. Civ. P. 32(a)(2) through (8) allows for the use of depositions when the witness is unavailable by reason of death. The dispute arises out of the disagreement on whether French's testimony identifying defendant is admissible under the Rules of Evidence. The plaintiff argues that the defendant was present during three days of testimony, which allowed an opportunity to cross examine French. The plaintiff concedes that the defendant was not identified by French until close to the end of the third day of deposition.

The court, while understanding the plaintiff's frustration, held in favor for the defendant. The decision held it appeared clear from the uncontested facts and that defendant was not provided a reasonable opportunity to cross-examine French about his identification of the defendant's products. The court also emphasized the sworn obligation to uphold the constitutional and procedural protections put in place to protect the defendants from potentially unwarranted liability.

The defendant's motion to strike and preclude the plaintiff's deposition testimony was granted. Therefore, as plaintiff could no longer provide admissible evidence connecting defendant to any alleged exposure, the defendant's motion for summary judgment was also granted.

Read the full decision here.

Summary Judgment Granted Where Worker's Compensation Act Bars Plaintiff's Claims

(U.S. District Court for the Western District of North Carolina, September 29, 2017)

Plaintiffs filed suit against Alcatel Lucent, as successor in interest to Western Electric and Bell Labs (Alcatel), alleging Mr. Moore developed mesothelioma as a result of his work as a cable puller from 1965-95. Alcatel moved for summary judgment, arguing that the North Carolina Worker's Compensation Act (Act) prohibited the plaintiffs' claims. The plaintiffs opposed summary judgment and took the position that the exception laid down by the court in *Woodson* applied.

The court's analysis began with the standard for summary judgment. Summary judgment is appropriate "if the movant shows there is no genuine dispute as to any material fact and the movant is entitled to judgment as matter of law."

The Act provided that employers are only liable to the extent permitted by the Act itself. Specifically, section 97-10 limited recovery under the Act in order to prevent plaintiffs from seeking "potentially larger damage awards in civil actions." However, an exception in *Woodson* exists when the employer's misconduct was intentional. The plaintiffs sought application of this exception. The court noted that the plaintiffs presented evidence that Western Electric manufactured and/or supplied asbestos containing products that were used by Mr. Moore. Further, Mr. Moore would have to manipulate those products causing dust breathed by plaintiff. Finally, Western Electric would have been aware of the state and federal laws regarding asbestos and failed to warn plaintiff. The court quickly concluded that the evidence did not rise the narrow exception laid down in *Woodson* because the plaintiffs failed to establish defendant *intentionally* chose the alleged misconduct. Accordingly, summary judgment was granted.

Read the full decision here.

Collateral Estoppel Leads to Grant of Summary Judgment for Pump Manufacturer

(U.S. District Court for the Eastern District of Missouri, September 11, 2017)

The plaintiffs filed suit in Missouri against multiple defendants including Buffalo Pumps, arguing that their decedent, Berj Hovsepian, developed mesothelioma as a result of exposure to asbestos containing products for which the defendants were responsible. The case was removed to the U.S. District Court. Prior to filing the Missouri suit, the plaintiffs filed suit against Buffalo in Massachusetts asserting very similar allegations. Buffalo moved for summary judgment in the Massachusetts case. The motion was granted as unopposed.

In the instant matter, Buffalo moved for summary judgment, arguing that the suit was barred by the doctrine of collateral estoppel. As for summary judgment, the court noted that summary judgment is appropriate when there is no genuine issue as to any material fact. Of course, the burden falls on the party seeking summary judgment. As for res judicata, the doctrine encompasses issue preclusion and claim preclusion, two distinct concepts. Issue preclusion also known as collateral estoppel states that "once a court has decided an issue of fact or law necessary to its judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." In sum, an issue that has already been decided cannot be re-litigated. Under Massachusetts law, collateral estoppel is applicable when "1) there was a final judgment on the merits in the previous adjudication, 2) the party against whom estoppel is asserted is a party (or in privity with a party) to the prior adjudication, 3) the issue decided in the prior adjudication is identical with the one presented in the action in question, and 4) the issue decided in the prior adjudication was essential to the judgment."

The plaintiffs took the position that the Massachusetts grant of summary judgment did not constitute final judgment, the issues were not litigated, the issues are not the same, and fairness requires a less rigid approach. The court stated that finality only requires the opportunity to be heard on the merits. Here, Plaintiff had the opportunity to litigate but did not to oppose Buffalo's motion. The plaintiffs also argued that they did not have an opportunity to litigate because Plaintiff's deposition had not concluded. The court was not persuaded, as the plaintiffs could have offered evidence illustrating a material dispute of fact. In fact, the plaintiffs could have sought additional discovery from Buffalo, but did not in the Massachusetts case. As for privity, the plaintiffs concede privity is met by the plaintiffs as special representatives of Mr. Hovsepian. Relying on the *Alves* decision, the court also analyzed the concept of identity of issues and stated that "generally speaking, Massachusetts courts examine the identity of issues by analyzing whether the same issues is at the crux of the claim." The Massachusetts case alleged that Mr. Hovsepian developed asbestosis as a result of Buffalo Pumps' negligence and failure to warn the dangers of asbestos containing products. The instant case alleged virtually the same according to the court. The plaintiff argued that the issues were not the same because asbestosis and mesothelioma are different diseases. The court acknowledged that latent asbestos diseases can present challenges on the doctrine of res judicata. However, the suits both arose out of the same allegations and same alleged exposures. Accordingly, the issues are the same.

Finally, the court found that the "issues involved in both cases were essential to the Massachusetts' court decision." Accordingly, the plaintiffs had their opportunity to litigate. Summary judgment was therefore granted.

Read the full decision here.

Gasket Manufacturer's Summary Judgment Affirmed Where Plaintiff Failed to Timely Disclose Exposure Affidavits of Fact Witness

(Court of Appeals of Ohio, Eighth District, Cuyahoga County, September 7, 2017)

Plaintiff Paul Heaton sued multiple defendants including an automotive gasket manufacturer and Honeywell International alleging his decedent, Robert Brawley, developed mesothelioma for which defendants were responsible. Fact witness Michael Victor was deposed on Brawley's use of the gasket manufacturer's gaskets on shade tree mechanic work from 1974-2010. The deposition lasted three days. On day one of Victor's deposition, he denied having any knowledge regarding Brawley's work on home renovations. However, Honeywell probed on that issue later during the deposition. The plaintiff's counsel refused to permit the witness to answer based on his prior answer concerning knowledge of home repair. A few months after the deposition, Victor passed away.

Remarkably, it was later learned that Victor had executed an affidavit that Brawley had in fact used the products that counsel for Honeywell had probed, i.e., joint compound. The affidavit averred that Brawley had used USG joint compound. Yet a second affidavit claiming that Brawley used Gold Bond joint compound was also signed by Mr. Victor but not learned about by the defendants until a year later. The affidavits were contra to the discovery responses signed by the plaintiff.

The gasket manufacturer moved for summary judgment, claiming that Victor's testimony was speculative. Honeywell moved in limine seeking the exclusion of Victor's testimony as the affidavits were not provided as supplemental discovery of which the plaintiff had knowledge. The gasket manufacturer also joined the in limine motion. The plaintiff opposed the motion stating that the omission was out of error rather than from intent. A hearing was held and the plaintiff's counsel offered to have sanctions placed against himself. The trial court was not persuaded by the offer and ruled to bar Victor's testimony. The gasket manufacturer quickly moved for summary judgment, arguing the plaintiff could not maintain his claim without the testimony.

The plaintiff then sought to reopen the discovery for the deposition of Brawley's brother-in-law, Roy Heaton. The plaintiff stipulated that Roy Heaton would be able to testify about home renovation projects in an effort to fix the omission of the affidavits. The court denied the plaintiff's request to reopen discovery and granted summary judgment in favor of the gasket manufacturer. The plaintiff then appealed.

On appeal, the gasket manufacturer argued that the scope of the appeal should be limited to the grant of summary judgment and should not include the issue of the trail court denial of the plaintiff's motion for reconsideration or exclusion of Victor's testimony.

The court began its analysis and stated that the grant of summary judgment was a final order and appealable. The court noted the lack of clarity when an order is final if it does not dispose of all defendants. As the order to exclude the testimony led to the grant of summary judgment for the gasket manufacturer and that order affected other defendants, the court would not limit the scope and concluded that the "merit" of the trial court orders would also be considered.

As for the striking of Victor's testimony, the court noted the broad discretion conferred to the trial court. As the decision did not dismiss the remaining defendants, the court decided to review under the abuse of discretion standard. Although the plaintiff's counsel vehemently stated that no intent to withhold the affidavits was present, the court stated that the effect of the omission is more important than intent. The plaintiff also argued the that trial court could have utilized other sanctions rather than excluding Victor's testimony. However, the court pointed out that the trial court gave the parties an opportunity to compromise but warned that exclusion would be the result should agreement not be reached. Additionally, the plaintiff's failure to supplement discovery with the affidavits took away "alternate exposures" especially against the backdrop of the witness' failing health. Relying on *Tiburzi*, the plaintiff took exception that he had no violated any court order. According to the court, *Tiburzi* was misplaced because "no court order is required before a court can impose sanctions for failing to supplement or correct prior discovery responses." Even though the plaintiff offered to stipulate with additional testimony from the brother in law, the trial court found the appropriate sanction according to the court.

The plaintiff also assigned error for the trial court's denial of his motion for reconsideration. Specifically, the plaintiff argued that since alternate exposure was found, the effect of omitting the affidavits was less prejudicial to the gasket manufacturer. The court stated that review of this issue was also abuse of discretion. However, the court was not persuaded because Roy's anticipated testimony was limited and general in nature whereas the affidavits were specific as to products. Accordingly, the record illustrated that nothing could substitute the striking of the testimony. Summary judgment was therefore affirmed.

Read the full decision here.

Court Denies Partial Motion for Summary Judgment on Punitive Damages Against John Crane While Granting Full Summary Judgment for Other Defendants

(U.S. District Court for the District of Delaware, August 30, 2017)

Icom Henry Evans and Johanna Elaine Evans filed an asbestos related personal injury action in the Delaware Superior Court against multiple defendants on June 11, 2015, asserting injuries arising from Mr. Evans' alleged harmful exposure to asbestos. Defendant John Crane filed a partial motion for summary judgment as to the plaintiffs' punitive damages claim. John Crane admits to having knowledge of the hazards of asbestos by 1970. However, the parties dispute whether John Crane had knowledge of the hazards of asbestos before 1970. The parties further dispute whether John Crane's knowledge after 1970 is relevant to consideration of the punitive damages issue.

Punitive damages are limited to situations where "a defendant's conduct is 'outrageous,' owing to 'gross negligence,' 'willful, wanton, and reckless indifference for the rights of others,' or behavior even more deplorable." "Punitive damages are not intended to compensate the plaintiff for a loss suffered, but instead are 'imposed for purposes of retribution and deterrence.' " The plaintiffs argue that (1) John Crane had actual knowledge of the hazards of asbestos as early as the 1930s, and (2) John Crane's post-exposure conduct provides evidence that is probative of John Crane's willful, wanton, and reckless state of mind. John Crane argues that the plaintiffs have no evidence establishing that by 1967, John Crane had actual knowledge that exposure to its asbestos-containing packing or gaskets caused an asbestos-related disease. As such, John Crane argues there is no evidence that it sold asbestos-containing products in a willful, wanton, or reckless manner, which would support a claim for punitive damages.

The court denied John Crane's motion and commented, "Thus, a dispute of material fact exists as to whether John Crane knew asbestos-containing products were harmful by 1967. As such, it is recommended that a trier of fact should determine whether John Crane knew asbestos-containing products were harmful, and chose not to warn potential users of the health risks. Furthermore, the trier of fact should determine if John Crane had such knowledge, and whether John Crane continued, nonetheless, to sell products in a manner that was in willful or wanton disregard, or in reckless indifference of potential harm to others. Therefore, the court recommends denying John Crane's motion for partial summary judgment."

The court in the same matter ruled on motions filed by defendants Foster Wheeler Energy Corporation, and Warren Pumps. The plaintiffs allege that Mr. Evans developed mesothelioma as a result of exposure to asbestos-containing products during the course of his employment as a fireman and boiler tender with the U.S. Navy from 1957 to 1967. Mr. Evans stated there were four Foster Wheeler boilers aboard the USS Bole, and that he worked on two of them. Mr. Evans testified that he would help with the refractory and the re-bricking of the furnaces on the Foster Wheeler boilers. Further, Mr. Evans stated that he worked on pumps and valves aboard the USS Kearsarge. However, Mr. Evans could not remember the manufacturer of any of the pumps aboard the USS Kearsarge.

Foster Wheeler argued that the bare metal defense applied to the facts of the case and was a full defense. The court agreed and stated:, "Plaintiffs have failed to show that a material issue of fact exists as to whether Mr. Evans was exposed to asbestos from products manufactured or supplied by Foster Wheeler aboard the USS Bole. Consequently, the court recommends granting Foster Wheeler's motion for summary judgment." Warren Pump's Motion was similarly granted. The court held that Mr. Evans' testimony was not enough to establish exposure to an asbestos-containing product manufactured by Warren Pumps aboard the USS Bole.

Read the full decision here.

Summary Judgment Granted to Premises Owner Because Asbestos Not Inherent on the Premise

(Superior Court of Delaware, August 30, 2017)

Plaintiff Sandra Kivell alleged her husband developed and died from mesothelioma due to his asbestos exposure as a union pipefitter and welder. Defendant Union Carbide moved for summary judgment, which was granted.

Union Carbide was a premises owner of a petrochemical facility in Taft, Louisiana, where decedent worked from January 1967-October 1969. Decedent did not work for and did not receive instruction from Union Carbide, which employed third-party contractors to build process units. Decedent testified he ran pipe and worked side by side with

insulators. Plaintiff cited to Louisiana case law with similar facts which found that the duty of reasonable care extended to employees of independent contractors.

Here, the court stated "…it seems that a key issue the court looks at in negligence actions against the premises owner under Louisiana law is whether genuine issues of material fact exist as to defendant's knowledge of the dangers posed by asbestos at the time plaintiff was employed on the premises." The court found that this case was distinguishable from the cases cited by Plaintiff. First, other case law found a distinction between hazards inherent in a defendant's premises (for which a premises owner owes a duty) and hazards inherent in an independent contractor's job (for which a premises owner does not owe a duty). Here, there was nothing in the facts to infer that asbestos was inherent in Union Carbide's premises. Second, even if Union Carbide owed a duty, plaintiff did not present evidence that Union Carbide knew of the risks of asbestos or specified the use of asbestos in construction.

The court likewise granted summary judgment on plaintiff's strict liability claim, because "…custody, 'for the purposes of strict liability, does not depend upon ownership, but involves the right of supervision, direction, and control…the mere physical presence of the thing on one's premises does not constitute custody.'"

Read the full decision here.

Summary Judgment Upheld for Georgia Pacific Because Proof Didn't Distinguish Between Asbestos and Non-Asbestos Product

(Superior Court of Delaware, August 18, 2017)

Defendant Georgia Pacific was granted partial summary judgment, in that all claims against the defendant "pre-1973" were barred. The plaintiff filed a motion for reconsideration arguing that the court overlooked the fact that the defendant stopped distributing asbestos joint compound in September 1973.

In response to the plaintiff's motion, the defendant argued that the court properly granted partial summary judgment relating to the plaintiff's pre-1973 claims as the decision was based on a *Stigliano* analysis, which states " when the record reveals that a defendant manufactured both asbestos-containing and non-asbestos containing versions of a product during the time period of alleged exposure, in the absence of evidence directly or circumstantially linking the plaintiff to the asbestos-containing product, the Court cannot draw the inference of exposure and summary judgment on product nexus must be granted." *Stigliano v. Westinghouse*, No. CIV.A 05C-06-0263ASB, 2006 WL 3026171, at *1 (Del. Super. Ct. Oct. 18, 2006).

The court agreed, as in this case, similar to *Stigliano*, the defendant manufactured both asbestos containing and non-asbestos containing joint compound beginning in 1973, and there was no evidence that the plaintiff worked with the defendant's asbestos containing joint compound *post* 1973. Accordingly, the plaintiff's motion for reconsideration was denied

Read the full decision here.

Summary Judgment Granted For Plaintiff's Failure to File Complaint Within the Statute of Limitations

(Superior Court of Delaware, August 18, 2017)

Ms. Bagwell filed suit against several defendants, alleging her husband developed lung cancer from asbestos related to Borg Warner clutches. The plaintiff's brother was the sole fact witness who recalled his brother performing clutch work starting in 1965 through the 1980s approximately one time per week. The plaintiff's expert report stated that the plaintiff was exposed to asbestos containing products including exposure to asbestos from the clutches. Mr. Bagwell was diagnosed in May of 2009 and passed away on January 28, 2010. The plaintiff's complaint was not filed until June of 2014. Accordingly, the defendant argued the plaintiff's complaint was barred under South Carolina law based on the applicable statute of limitations.

The court noted that Delaware rule prohibited bringing an action arising outside of the state when that state's limitation has already expired. Here, a limitation of two years is applied in a personal injury matter from the date of injury. The plaintiff countered and stated that a personal injury action begins to run in Delaware once the plaintiff has knowledge of the injury. The test for knowledge includes 1) plaintiff's knowledge and education 2) the extent of his recourse to medical evaluation 3) the consistency of the medical diagnosis and 4) the plaintiff's follow up efforts after

the first medical evaluation. The court agreed with the plaintiff's analysis of the rule on limitations but found nothing put forth by the plaintiff to support her notation that her complaint fit the analysis.

The court went on to confirm that " it is clear that asbestos cases fall into the latent disease category, and the time begins to run when the plaintiff is chargeable with knowledge that his condition is attributable to asbestos exposure" but the court could not conclude when Ms. Bagwell first knew the decedent's disease was related to asbestos. Consequently, summary granted was entered in favor of defendant.

Read the full decision here.

Pump Manufacturer Obtains Summary Judgment Based on Lack of Maintenance History and Identification of Replacement Parts

(Superior Court of Delaware, August 18, 2017)

Plaintiff Jill Dudley alleged that her husband Frank worked on pumps from 1966-67 while employed at Cam Chemical Company in Detroit, Michigan. Defendant FMC moved for summary judgment, which the court granted.

Frank Dudley testified that at least ten pumps were made by Chicago Pump; he broke down these pumps and repaired the gaskets. The court applied Michigan law, which required proof that the injured plaintiff was exposed to an asbestos-containing product for which a defendant was responsible. Michigan law also applied the substantial factor test for causation, such that exposure was significant in terms of intensity, when viewed in the scope of the entire work history, and the number and extent of other contributing factors. Here, the plaintiff did not offer evidence, beyond speculation, that Mr. Dudley worked with an asbestos-containing product made by FMC; he did not know the maintenance history of the pumps or the manufacturer of the replacement parts. Thus, summary judgment was granted.

Read the full decision here.

Pipe Manufacturer's Evidence Not Enough Under Causation Standard for pre-1982 claims; Summary Judgment Denied

(Superior Court of Delaware, August 17, 2017)

The plaintiffs filed an action in the Superior Court of Delaware against defendant CertainTeed Corporation alleging that the plaintiff, Jack Trousdale, was exposed to asbestos from CertainTeed's products. The plaintiffs contend that Mr. Trousdale purchased a flat-bed tractor trailer in 1972 to work as an independent truck driver, and as part of his job Mr. Trousdale shipped CertainTeed pipe. The plaintiffs presented evidence that the defendant sold asbestos-cement pipe from Ambler, Pennsylvania from 1962 through 1982.

CertainTeed filed a motion for summary judgment. The court applied Indiana law to the plaintiff's claims. To avoid summary judgment under Indiana law, the plaintiff "must produce evidence sufficient to support an inference that he inhaled asbestos dust from the defendant's product." This inference can only be made if it is shown that the product, as it was used during the plaintiff's tenure at the job site, could possibly have produced a significant amount of asbestos dust and that the plaintiff might have inhaled the dust." "However, an inference is not reasonable when it rests on no more than speculation or conjecture."

The defendant argued the plaintiff's description with the alleged piping was inconsistent with CertainTeed products. Additionally, CertainTeed argued that the plaintiffs have not met their burden under Indiana law, which requires that they prove Mr. Trousdale was exposed to the defendant's product and that product "produced a significant amount of asbestos dust and that the plaintiff might have inhaled the dust."

The court found that the plaintiffs met their product identification burden. The defendant's argument regarding the alleged discrepancies in Mr. Trousdale's description of the defendant's asbestos pipes, and the defendant's description of the pipes, are issues of fact appropriate for the jury. The plaintiffs further demonstrated that genuine disputes of material facts exist that the plaintiff's work produced a significant amount of asbestos dust pursuant to Indiana's causation standard. Thus, the court denied motion for summary judgement on all allegations prior to 1982.

Mr. Trousdale testified that he did not haul CertainTeed pipe out of another plant except for the one in Pennsylvania, and CertainTeed presented evidence that it stopped manufacturing asbestos cement pipe at the Ambler, Pennsylvania plant in 1982. As a result, summary judgment was granted regarding any allegations after 1982.

Read the full decision here.

Brake and Talc Supplier Successfully Move to Dismiss on Lack of Personal Jurisdiction

(U.S. District Court for the Western District of Washington, July 31, 2017)

Following up on prior ACT posts as to the *Hodjera* suit out of the Western District of Washington, the court granted motions for summary judgment filed by defendants Honeywell International and Imerys Talc America Inc. under Fed. R. Civ. P. 12(c) for lack of personal jurisdiction.

The court reiterated that due process requires a district court to have personal jurisdiction over a defendant in order to adjudicate a claim against it. *Daimler AG v. Bauman*, 134 S. Ct. 746, 753 (2014). Further, the plaintiffs have the burden of demonstrating that the court may exercise personal jurisdiction over the defendant. Absent an evidentiary hearing, plaintiffs need only make, through the submission of pleadings and affidavits a prima facie showing of facts supporting personal jurisdiction to avoid dismissal. The court can establish personal jurisdiction over a particular defendant through either general or specific jurisdiction. It was clear that the court lacked general jurisdiction over either defendant as neither Honeywell nor Imerys Talc were incorporated in Washington or had their principal place of business in Washington.

In establishing specific jurisdiction, a defendant may also be sued in a forum where it has minimal contacts, provided those contacts are purposefully directed at the forum, the claim arises out of those contacts, and the exercise of jurisdiction over that party is reasonable. [Citation Omitted]. The court addressed the facts of each defendant's motion as to specific jurisdiction as follows:

Honeywell International

The plaintiffs opposed Honeywell's motion alleging that Bendix Corporation, Honeywell's predecessor-in-interest, purposefully availed itself of this Washington forum by manufacturing friction materials for use in brakes, that these materials contained asbestos, and that Hodjera worked with these friction materials. Plaintiffs further allege that Honeywell is licensed to do business in Washington State, and that it has offices throughout the state. However, the court found that the plaintiffs still failed to satisfy the second prong of the specific jurisdiction test: the requirement that their claim arise out of the defendant's purposeful contacts with the forum state. The plaintiff listed in the complaint that the asbestos exposure occurred in Toronto, Ontario. The plaintiffs relied upon the argument that "the products defendant sold in Washington include the same kind of products with which plaintiff worked, causing his exposure to asbestos. This was not enough. There was no allegation that Hodjera's exposure would not have occurred "but for" Honeywell's contacts with Washington. Hodjera's history of working with "similar" products in Toronto fails to establish specific jurisdiction over Honeywell in Washington. Accordingly, Honeywell's motion for summary judgment was granted.

Imerys Talc

The plaintiffs similarly opposed Imerys Talc's motion alleging that Imerys Talc predecessor-in-interest, purposefully availed itself of this Washington forum by mining and processing talc, which was distributed by former defendant Whittaker, Clark & Daniels to defendant Johnson & Johnson for use in its "Shower-to-Shower" cosmetic talc product, which in turn was "intended for widespread distribution throughout North America. Again, the plaintiffs argue that Imerys Talc was licensed to do business in Washington State. Similar to Honeywell's motion, the court found the plaintiffs failed to satisfy the second prong of the specific jurisdiction test: the requirement that their claim arise out of the defendant's purposeful contacts with the forum state. Accordingly, and for the same analysis provided in the Honeywell motion, the court granted Imerys Talc's motion for summary judgment based on lack of personal jurisdiction.

Read the full decision here.

Various Product Manufacturers Granted Summary Judgment Under Maritime and Oregon Law

(U.S. District Court, District of Delaware, July 21, 2017)

Harold and Judy Haynes filed this asbestos related personal injury action in the Delaware Superior Court against multiple defendants on June 3, 2016, asserting claims arising from Mr. Haynes' alleged harmful exposure to asbestos. Defendant Crane Co. removed the action to U.S. District Court in Delaware on July 15, 2016. Defendants Aurora, Warren Pumps, Pfizer, FMC, Honeywell, BorgWarner, and Air & Liquid filed motions for summary judgment on March 24, 2017.The plaintiffs did not respond to these motions. Counsel for the defendants sent letters to the court seeking dismissal due to the plaintiffs' lack of opposition to its summary judgment motion.

The plaintiffs alleged that Mr. Haynes developed lung cancer as a result of exposure to asbestos-containing products during the course of his service as a boiler tender with the U.S. Navy from 1959 to 1963. In addition, Mr. Haynes alleged he was exposed to asbestos from 1963 to 2015 as a result of his employment as a fireman, mechanic, laborer, and janitor. Mr. Haynes was deposed on December 6 and 7, 2016. The plaintiffs did not produce any other fact or product identification witnesses for deposition.

The parties agreed that Oregon law applies to all land-based claims. Under Oregon law, a plaintiff must establish that a particular defendant's product was a "substantial factor" in causing the plaintiff's injury. Further, a plaintiff must present evidence that the "defendant's asbestos was present in the workplace."

Additionally, the parties did not dispute that maritime law applied to all Naval/sea-based claims. In order to establish causation in an asbestos claim under maritime law, a plaintiff must show, for each defendant, that "(1) he was exposed to the defendant's product, and (2) the product was a substantial factor in causing the injury he suffered." Other courts in this Circuit recognize a third element and require a plaintiff to "show that (3) the defendant manufactured or distributed the asbestos-containing product to which exposure is alleged."

Based solely on testimony of Mr. Haynes, the court found that the plaintiffs did not meet the required burdens described above. Accordingly, the court recommended granting the defendants' motions for summary judgment.

Read the full decision here.

Generic Expert Report Insufficient to Satisfy Summary Judgment Causation Standard

(Superior Court of Delaware, July 19, 2017)

Plaintiff James Blair as the administer of the estate of Walter Godfrey, Jr. filed suit against defendant Cleaver-Brooks in the Superior Court of Delaware claiming that the decedent was exposed to asbestos from the defendant's boilers and a result, was diagnosed and ultimately passed away from lung cancer. As the sole product identification witness, Walter Godfrey, Jr. testified to working with Cleaver-Brooks boilers at various locations between 1977 and 2013 while employed with Connecticut Boiler Repair.

The defendant moved for summary judgment and argued, among other things, that the plaintiff's expert medical report is generic and did not meet the necessary causation standard. Specifically, the defendant points out that the plaintiff's expert report mentions asbestos in three generic statements: (1) Godfrey was a 69-year old boiler machinist who was exposed to asbestos from 1963 until 1983; (2) exposure to asbestos is recognized as a substantial contributing cause of primary lung cancer; and (3) within the doctor's conclusion that in his opinion, and to a reasonable degree of medical certainty, Godfrey's exposure to asbestos was a substantial contributing cause of his primary lung cancer. This report never mentions or casually links the plaintiff's lung cancer to the defendant's product directly.

This case was ruled under Connecticut law from which a plaintiff's right to sue for damages allegedly caused by a defective product is governed by the Connecticut Product Liability Act (CPLA) and is the exclusive remedy for claims brought against product sellers for personal injuries caused by a defective product. Further, a plaintiff in an asbestos products liability action must demonstrate that "a particular defendant's product was used at the job site and that the plaintiff was in proximity to that product at the time it was being used." The plaintiff "must produce evidence sufficient to support an inference that he inhaled asbestos dust from the defendant's product. Accordingly, the plaintiff "must (a) identify an asbestos-containing product for which a defendant is responsible, (b) prove that he has suffered damages,

and (c) prove that defendant's asbestos-containing product was a substantial factor in causing his damages." [Citation Omitted].

In this matter, the Supreme Court of Delaware found that the plaintiff's expert report was insufficient to establish causation. Here, the court noted that to make a prima facie showing with respect to the cause of an asbestos-related disease, a plaintiff must introduce direct competent expert medical testimony that a defendant's asbestos product was a proximate cause of the plaintiff's injury. Specifically, this requires the plaintiff's expert medical witness to state, in terms of reasonable medical probability, that there was a causal relationship between the defendant's product and the plaintiff's physical injury, i.e. that but for the plaintiff's exposure to the defendant's asbestos product, the plaintiff's injury would not have occurred. In reviewing the plaintiff's expert report, the court agreed with the defendant's contention that the report was a generic causation report that did not link Plaintiff's disease to a particular product., Accordingly, the court reasoned that the lack of such expert medical testimony in an action which alleges that a plaintiff's asbestos-related disease was the result of exposure to a particular defendant's asbestos-containing product, the issue of proximate cause cannot be submitted to the jury. The court further noted that without this nexus, "a lay jury's finding that exposure to each defendant's asbestos product was the proximate cause of each plaintiff's asbestos-related disease would necessarily have been speculation." [Citation Omitted].

Accordingly, this court found that the plaintiff's expert report created nothing more than a speculative nexus between Godfrey's injuries and the defendant's product. The three generic statements within this report failed to casually link the defendant's product to the plaintiff's disease and thus, the report is insufficient to meet the necessary standard. The defendant's motion for summary judgment was granted.

Read the full decision here.

Plaintiff Failure to Establish Retailer's Knowledge of Danger of Asbestos Leads to Summary Judgment

(Superior Court of Delaware, July 12, 2017)

Plaintiffs brought this suit against multiple defendants for Mr. Glaser's alleged asbestos related injuries. Scott Glaser alleged that he was exposed to asbestos floor tile sold by Sears and Roebuck ("Sears") while working for various employers. His work required him to clean up "scraps or pieces of floor tile off the floor." Defendant took the position that it was a retailer and never "mined, milled, processed, or distributed wholesale asbestos containing products." The Court noted that under Michigan law for a products liability action, a "seller other than a manufacturer is not liable for harm allegedly caused by the product unless either of the following is true:

a) The seller failed to exercise a reasonable care, including breach of any implied warranty, with respect to the product and that failure was a proximate cause of the person's injuries;

b) The seller made an express warranty as to the product, the product failed to conform to the warranty, and the failure to conform to the warranty was a proximate cause of the person's harm.

Sears argued that Plaintiff had not established any of the above. Plaintiff countered and argued that Sears had become aware of the dangers of asbestos exposure in the 1970's. However, the Court was not convinced that the interrogatories upon which Plaintiff relied actually established Sears' knowledge. On the contrary, Plaintiff's motion supported Sears' argument that it was not a manufacturer of asbestos tiles. Relying on the decision from *Dreyer*, the court concluded that a manufacturer is not required to "warn dangers associated with another manufacturer's product." Finally, the Court pointed out that Plaintiff did not put forth any support for the argument that a retailer has a duty to warn of the dangers associated with a product manufactured by another. Consequently, summary judgment was granted in favor of Sears.

Read the full decision here.

Summary Judgment Denied Upon Showing that Defendant's Boilers Contained Asbestos Gaskets and Rope

(Superior Court of Delaware, July 12, 2017)

Plaintiff Clarence Dionne filed suit against several defendants including Cleaver Brooks alleging that he was exposed to asbestos while working at the Bay Area Medical Facility. Plaintiff alleged that he "scraped off the rope gaskets and supervised this task" on the doors of Defendant's boilers. Not only did he personally perform this work but he also

supervised others in the process. After a promotion in 1975, he took on the task of ordering replacement parts through his secretary. The replacement gaskets and insulation were supplied by Cleaver Brooks according to Mr. Dionne.

Defendant argued that Plaintiff could only speculate whether the boilers contained asbestos replacement parts. Further, Plaintiff could not say whether those parts contained asbestos. For causation, the Court stated that the question is "whether the defendant's negligence was a substantial factor in contributing to the result." Here, the Court disagreed with Defendant as Plaintiff had put forth evidence that Cleaver Brooks had "incorporated asbestos-gaskets and rope in parts of their boilers up through the late 1970's." Additionally, evidence that Clever Brooks sold replacement gaskets, packing, cement and rope containing asbestos had been submitted by Plaintiff. Based on the above facts, the Court concluded that a reasonable jury could find that Defendant's conduct was a substantial contributing factor in the development of Plaintiff's alleged injury. Therefore, summary judgment was denied.

Read the full decision here.

Summary Judgment Granted upon Plaintiff's Failure to Establish Replacement Parts Supplied by Valve Defendant

(Superior Court of Delaware, July 12, 2017)

Plaintiff brought this action against several defendants including Fairbanks Company alleging exposure to asbestos while working with Defendant's valves. Specifically, Plaintiff recalled working with globe, gate and ball valves for various employers and locations. Plaintiff also testified that he replaced packing in the valves and personally removed external insulation to repair the valves. Plaintiff assumed that the packing he encountered contained asbestos based on the high heat application of the equipment.
Fairbanks argued that no evidence pointed to it having made asbestos packing Plaintiff encountered. Plaintiff countered and relied on interrogatories whereby some valves required asbestos. Plaintiff further pointed to catalogs that "specifically and regularly called for the use of asbestos gaskets packing." Defendant also argued that it had no duty to warn Plaintiff of the dangers of asbestos parts made by another manufacturer. The Court stated that the Plaintiff is required to prove 1) the defendant's products contained asbestos (product identification) 2) that the victim was exposed to asbestos in the defendant's product (exposure) and 3) that such exposure was a substantial contributing factor in causing harm to the victim (substantial factor).

Although Plaintiff put forth evidence that Fairbanks' gaskets and packing originally contained asbestos in its valves, Plaintiff had not proved that those encountered by Plaintiff were manufactured by Fairbanks. In fact, the record showed that the gaskets and packing had been changed prior to Plaintiff's work. Simply put, nothing showed that the parts were supplied or made by Fairbanks. Denying summary judgment under these circumstances would be tantamount to speculation for jury purposes. Accordingly, summary judgment was granted in favor of Fairbanks.

Read the full decision here.

A similar decision for Cleaver-Brooks was previously reported. View here.

Plaintiff Fails to Demonstrate Decedent Worked with Boiler Manufacture's Product; Summary Judgment Granted

(Superior Court of Delaware, July 11, 2017)

Dorothy Charbonneau filed suit in the Superior Court of Delaware against multiple defendants alleging the defendants' use of asbestos caused her husband, Robert Charbonneau, to contract an asbestos related disease. Mr. Charbonneau testified that he believed he was exposed to asbestos while maintaining and cleaning multiple boilers manufactured by Cleaver-Brooks throughout his employment career. Mr. Charbonneau also testified that he removed a sectional boiler during employment with Smith Mechanical. He testified that the boiler may have been Cleaver-Brooks but stated that he believed this because "they had a lot of Cleaver-Brooks in the area."

Cleaver-Brooks contended that the plaintiff's claims fail under Massachusetts law because a manufacturer does not owe a duty to warn for asbestos dangers from other manufacturers' parts. Applying Massachusetts law, to prove causation in an asbestos case, the plaintiff must establish (1) that the defendant's product contained asbestos (product identification), (2) that the victim was exposed to the asbestos in the defendant's product (exposure), and (3) that such exposure was a substantial contributing factor in causing harm to the victim (substantial factor).

Massachusetts cases have made it clear that to "prove causation in an asbestos case, it is plaintiff's principal burden to show that a defendant's product contained asbestos and that the victim was exposed to the asbestos in the defendant's product." The issue in this matter is that the plaintiff has not shown that her husband was exposed to asbestos from a product manufactured by Cleaver-Brooks. Mr. Charbonneau believed that the parts contained asbestos because of the high-heat application, and he could not recall the name of the replacement parts.

Additionally, Mr. Charbonneau removed one boiler during the course of his employment and he was not sure whether the boiler was Cleaver-Brooks. There is no evidence in the record that the replacement parts Mr. Charbonneau worked with were asbestos parts manufactured or supplied by Cleaver-Brooks. As such, the court granted Cleaver-Brook's motion for summary judgment, holding that the plaintiff failed to meet her burden to show that the defendant's product contained asbestos and that the victim was exposed to the asbestos in the defendant's product.

Read the full decision here.

Wrongful Death Claims Barred by Res Judicata from Prior Loss of Consortium Case

(California Court of Appeal, July 11, 2017)

In this wrongful death case, plaintiff Janet Stewart appealed the grant of summary judgment to Union Carbide that her loss of consortium claim was barred by res judicata. The plaintiff also argued a miscarriage of justice in the setoff of her deceased husband's settlement with two asbestos bankruptcy trusts against her entire economic damage award. The court affirmed both rulings.

Larry Stewart worked as a plumber from 1968-2007 when he was diagnosed with mesothelioma. He and his wife filed a personal injury lawsuit (Stewart I). At trial, Union Carbide received a directed verdict on the fraud claim, but the jury found it liable for negligence and strict products liability. The jury found Union Carbide 85 percent at fault and Hamilton Materials 15 percent at fault. After setoffs, the court entered judgment in favor of the plaintiffs for various amounts and Union Carbide appealed (which was affirmed). While the appeal was pending, Larry Stewart settled his claim against the Gypsum Trust and Manville Trust. As part of the settlements Larry Stewart released future claims by his heirs. Janet Stewart received money from these settlements.

After trial, Larry Stewart died, and one year later Janet Stewart and her two adult stepchildren filed this wrongful death lawsuit (Stewart II). Union Carbide settled with the stepchildren, but moved for summary judgment on the claims with Janet Stewart.

The court reviewed California law in finding that her loss of consortium claims were barred. In a split decision, the California Supreme Court previously concluded in a lung cancer smoke case that a widow's wrongful death action involved the same primary right and breach as her former loss of consortium action. Both Stewart cases involved the same allegations of permanent deprivation of Larry Stewart's consortium, and the court was bound by the Supreme Court decision. Further, the fact that Janet Stewart did not seek post-death loss of consortium damages in Stewart I did not distinguish this case. "Like the plaintiff in *Boeken*, in Stewart appellant alleged permanent deprivation of her husband's consortium and could have sought all her loss of consortium damages in that case. Res judicata precludes her from splitting her cause of action." Further attempts to distinguish *Boeken* likewise fail.

The plaintiff also challenged the settlement credit the trial court applied against her award for economic damages. She argued that the Gypsum and Manville settlements could not be applied to her award in this case because she did not sign the released. Similar arguments were rejected in prior case law. Further, it was undisputed that her stipulated damage award in this case was solely for economic damages, and California civil procedure mandated that Union Carbide was entitled to a credit against her entire damage award.

Read the full decision here.

Summary Judgment Overturned as Lab Suppliers Found to Have Burden of Causation

(State of New York Supreme Court, Appellate Division Third Judicial Department, July 6, 2017

Plaintiff Eileen A. O'Connor was diagnosed with pleural mesothelioma allegedly caused from exposure to equipment containing asbestos while working at a research lab from approximately 1975-79. The plaintiff filed suit in February 2015 against several defendants, including suppliers of various products used at this research lab.

Supplier defendants moved for summary judgment arguing, among other things, that the plaintiffs failed to identify them as ***the suppliers*** of the asbestos-containing products in question. The Supreme Court granted the defendants' motions dismissing the complaint against them, finding the plaintiffs failed to adequately identify any defendants as the supplier of the asbestos-containing products at issue. The plaintiffs appealed.

Upon reviewing this appeal, the court emphasized that a defendant cannot prevail on a motion for summary judgment merely by correctly arguing that the record before a court on the motion would be one which, if presented at trial, would fail to satisfy a plaintiff's burden of proof and the court would be required to direct a verdict for. Accordingly, the plaintiffs' burden to establish a material issue of fact as to facts and conditions from which the defendants' liability may reasonably be inferred is only triggered in the event that a moving defendant made the aforementioned prima facie showing. [Citation Omitted]. Therefore, in order to prevail at summary judgment, the defendants bore the initial burden of demonstrating that their respective products "could not have contributed to the causation" of the plaintiff's asbestos-related injuries. The court further stated that a defendant cannot satisfy this burden by merely pointing to gaps in a plaintiff's proof.

In this case, the defendants submitted the plaintiffs' responses to interrogatories, wherein the plaintiffs listed the products containing asbestos that the plaintiff was exposed to and stated that the products were supplied by the defendants, among others. However, one defendant, in its response to the plaintiff's interrogatories, stated that, "given the passage of many decades and … [its] adherence to reasonable and normal record retention policies," it did not have records of selling these products to the research lab. However, although none of the deponents could attest to whether any of the defendants' brand names, trademarks or logos were present on asbestos-containing products during the relevant time period (1975-1979) that the plaintiff and other research lab employees testified there were products containing asbestos in the lab. Further, these employees consulted the defendants' supply catalogs, among others, to place orders for these products.

Viewing this evidence in the light most favorable to the plaintiffs, the Supreme Court of New York, Appellate Division, Third Department, found the defendants lack of documentation from the 1970s does not establish that it did not sell asbestos-containing products to the research lab. Otherwise, the defendants merely pointed to perceived gaps in the plaintiffs' proof rather than submitting evidence showing why the plaintiff's claims fail. Accordingly, the court found that these motions should have been denied, and reversed the orders.

Read the full decision here.

Pfizer Not an "Apparent Manufacturer" of Refractory Products Used at Shipyard; Summary Judgment Affirmed

(Court of Appeals of Washington, June 26, 2017)

Plaintiff Margaret Rublee appealed the summary judgment dismissal against defendant Pfizer, Inc. The decedent, Vernon Rublee, was a machinist at the Puget Sound Naval Shipyard from 1965-1980 and died of mesothelioma in 2015. The appellate court affirmed summary judgment for Pfizer.

While at the shipyard, he worked on steam turbines with asbestos lagging. In replacing the lagging they used two refractory products — Insulag and Panelag. Both the decedent and other workers testified as to seeing "Pfizer" on the bags. Quigley Company made the products, which both contained asbestos until the early 1970s. Although Pfizer acquired Quigley in 1968 as a wholly owned subsidiary, Quigley continued all operations, sales, and distributions of the products. In 2004 Quigley filed for bankruptcy; in 2013 the United States District Court for the Southern District of New York approved a reorganization plan that created an asbestos injury trust to compensate claimants, and enjoined parties from suing Quigley for asbestos-related injuries. While this injunction also prevented claims against Pfizer based on its control of Quigley, it did not prevent claims against Pfizer as an "apparent manufacturer."

The plaintiff relied on Section 400 of the Second Restatement, which states that "[o]ne who puts out as his own product a chattel manufactured by another is subject to the same liability as though he were its manufacturer." The legal community commonly called this "apparent manufacturer liability." First, the court concluded that although no Washington appellate court has adopted this section, if it were to come before the Washington Supreme Court, it would be applied. The court then looked to other courts' application of Section 400 for persuasive authority.

Courts generally applied one of three tests for apparent manufacturer liability – objective reliance; actual reliance; and "enterprise liability." In this case, the plaintiff's evidence did not satisfy any of these tests. The majority of courts applied the objective reliance test, or whether a reasonable consumer would have relied upon a label or advertising materials of a product in purchasing it. Courts appeared to use the viewpoint of the purchasing public. The court agreed with Pfizer in that this test should be applied from the viewpoint of the agents who actually purchased the refractory product, not an ordinary, reasonable consumer. Thus here, the plaintiff was required to show that a reasonable purchaser of refractory materials — the shipyard —would have relied upon Pfizer's reputation and assurances of quality in purchasing the products. The record contained several marketing items containing Pfizer's logo, but it was alongside Quigley's, which was more prominent. Reasonable readers would not infer that Pfizer made these products. Further, the affidavit from the plaintiff's expert stating that Pfizer logos would confuse consumers was taken from the viewpoint of an ordinary member of the public, not the purchasers from the shipyard. None of the evidence suggested that industrial purchasers would think Pfizer made the products.

The plaintiff's claim likewise failed under the actual reliance test, which asked whether the plaintiff showed that he or she actually and reasonably relied upon the apparent manufacturer's trademark, reputation, or assurances of product quality in purchasing the defective product at issue. Few courts have required actual reliance. The third test, enterprise liability, asked whether the defendant participated substantially in the design, manufacture or distribution of the defective product, and required the defendant' trademark to appear on the product. The plaintiff's evidence failed this test as well, and few courts have applied it.

Finally, the plaintiff's theory of liability based on comment d to § 400 failed. Comment d indicated that a company could be liable as an apparent manufacturer if it "affixes to [the product its] trade name or trademark." The comment explained that when a label identified the company "as an indication of the quality or wholesomeness of the chattel, there is an added emphasis that the user can rely upon the reputation of the [company]." The comment also specified that a trademark "licensor, who does not sell or otherwise distribute products, is not liable under this Section of this Restatement."

Thus, the court stated: "A company that, like Pfizer, placed its logo on a product but did not sell it or 'participate substantially in [its] design, manufacture, or distribution' should not expect to be held liable for harms the product caused. On this record, any liability Pfizer incurred would stem not from representing itself as the dangerous products' manufacturer but from owning the company that did manufacture and sell the products."

Read the full decision here.

Misidentification of Brake Manufacturer's Name Sufficient for Summary Judgment

(Superior Court of Delaware, June 14, 2017)

The plaintiffs filed suit in the Superior Court of Delaware claiming that Amanda Dullinger was secondarily exposed to Defendant Abex LLC's asbestos containing brakes while she was a child causing her to develop mesothelioma. The plaintiff's mother, Tammy Allen, was the plaintiffs' primary product identification witness. Ms. Allen testified that Ms. Dullinger was present when automotive work was done between 1982 and 1986. Specifically, Ms. Dullinger testified that "Apex" brakes were one of the top three brands of brakes used around Ms. Dullinger. Further, she believed the "Apex" brakes were fully assembled brake shoes and the box said the brakes contained asbestos.

Abex argued that it was entitled to summary judgment based on Ms. Allen's testimony. The core of Abex's argument was that the plaintiff lacked product identification evidence because the product identification witness, Ms. Allen, identified the brakes as "Apex" and not "Abex." The defendant also argued that Abex never manufactured fully assembled passenger vehicle brake shoes like Ms. Allen identified.

The court applied New Hampshire substantive law to this matter. Abex argued that under New Hampshire law, the substantial factor test applies, and the plaintiffs were unable to show that the defendant's actions were a "substantial factor in bringing about the harm." The court granted Abex summary judgment, stating, "At no point did Ms. Allen ever use the word "Abex," and this product identification is insufficient. Even if this Court determines that "Apex" was sufficient product identification, viewing the evidence in a light most favorable to Plaintiffs, the Court finds that there

are no genuine issues of material fact. Defendant's offered testimony from a 2014 Abex trial stating that Abex sold brake linings, and not fully manufactured brakes."

Read the full decision here.

Successor Liability Decision Reversed in Oregon

(Court of Appeals of Oregon, June 7, 2017)

The plaintiff appealed the trial court's granting of the defendant's motion for summary judgment on successor liability. This suit involves the plaintiff's exposure to asbestos from his work in Portland shipyards during the 1950s. The defendant moved for summary judgment on the ground that any of its liabilities "that may have existed prior to 1965 were transferred to another company" and, therefore, it could not be held liable for the alleged injuries suffered prior to that transfer.

The plaintiff appealed this decision arguing that the court erred by denying the plaintiff, the nonmoving party, the benefit of all reasonable inferences. In granting the defendant's motion, the trial court concluded that there was no specific document delineating the defendant's transfer of liabilities and there was significant and cumulative circumstantial evidence that the transfer occurred "as part and parcel of the subsidiary's creation." The court further noted that the mere absence of an actual record of transfer did not support a finding that the liabilities ***were not*** transferred, especially where the plaintiff had not pointed to any evidence in the record tending to negate the inferences raised by the defendant's evidence.

The Court of Appeals of Oregon disagreed. Upon its review in this appeal, this court pointed to the fact that the defendant acknowledged that it would have the burden of persuasion at trial as to the specific issue of whether it transferred its liability, the subject of its motion. The general rule in Oregon is that when one corporation purchases all of the assets of another corporation, the purchasing corporation does not become liable for the debts and liabilities of the selling corporation, unless one of four recognized exceptions are met. [Citation Omitted]. The defendant only claimed one of these exceptions – where the purchaser expressly or impliedly agreed to assume the seller's debts. In light of the above, the court found that it would be the defendant's burden at trial to establish that its subsidiary indeed expressly or impliedly agreed to assume defendant's liabilities. In other words, it was ***not*** the plaintiff's burden to establish that the subsidiary had not agreed to assume such liabilities.

Under Oregon law, in order for the defendant to be entitled to summary judgment, it was the defendant's burden to demonstrate that it transferred the specific tort liability at issue in this case. Here, there was no direct evidence of the transfer and assumption of liabilities. In viewing the evidence in the light most favorable to the plaintiff, the Court of Appeals of Oregon concluded that a reasonable fact finder could reject the defendant's defense. The decision was reversed and remanded.

Read the full decision here.

Plaintiff's Mesothelioma Claims Barred by Wisconsin Worker's Compensation Act

(U.S. Court of Appeals for the Seventh Circuit, June 6, 2017)

In a consolidated matter, three of the plaintiffs, Diane Jacobs, Katrina Masephol, and Janice Seehar (the Weyerhaeuser plaintiffs), filed claims against various defendants after developing mesothelioma. Each had worked for Weyerhaeuser for years in close contact with asbestos. As such, in order to get around Wisconsin's Workers Compensation Act, *Wis. Stat. § 102.03(2),* which provides the "exclusive remedy against the employer" for work-related injuries, the plaintiffs argued that their asbestos-related injuries were not caused on the job, but at home and in the community, and style these as public and private nuisance claims.

The plaintiffs presented expert witnesses in support of this theory but the district judge rejected this testimony finding that plaintiffs failed to demonstrate that the expert testimony would be reliable. The judge reasoned that none of these three plaintiffs lived close enough to the Weyerhaeuser plant long enough for the experts to opine that non-occupational exposure contributed significantly to their injuries. With respect to other plaintiffs in this consolidation, the judge actually found the plaintiffs' expert witness testimony admissible because these plaintiffs lived closer to the plant. The court further acknowledged that a small exposure might contribute to developing mesothelioma. However, the testimony of the plaintiffs' experts regarding the Weyerhaeuser plaintiffs could not support the legal finding of proximate cause for such non-occupational exposure. The plaintiffs appealed this decision.

On appeal, the United States Court of Appeals, Seventh Circuit noted that it was obvious that the district court was concerned that the expert testimony proffered by the plaintiffs' counsel was an attempt to avoid the exclusive remedy provisions of Wisconsin law, offering jurors a way to award damages under a cause of action that should otherwise be foreclosed. However, they still managed to allow expert testimony into the other plaintiffs cases because they lived closer to the factory. The court continued that this admission under Rule 702 seems overly deferential to a highly dubious theory of harm, but neither this nor the exclusion of the same testimony with respect to the three plaintiffs on appeal could be considered an abuse of discretion. [Citation Omitted]. Therefore, absent this novel claim of non-occupational exposure, the three Weyerhaeuser plaintiffs had "failed to put forth sufficient evidence for a reasonable jury to conclude that non-occupational **asbestos** exposure was a substantial contributor to their respective injuries." Accordingly, the district court properly dismissed the public and private nuisance claims

Read the full decision here.

Insulation Supplier Contracting with U.S. Navy Protected by Government Contractor Defense

(Court of Appeals of California, First Appellate District, June 6, 2017)

Jay Wanlass filed suit against Metalclad Insulation Corp. (Metalclad) based on alleged exposure to friable asbestos. Metalclad moved for summary judgment, which the trial court granted. The plaintiff appealed that decision to the First District Court of Appeal for Division 2 in California.

In 1968, Metalclad entered into an agreement with the United States Navy to supply insulation for piping on four nuclear-powered submarines. Those submarines were all constructed at Mare Island Naval Shipyard in Vallejo, California. The plaintiff alleged he was exposed to asbestos containing insulation while he was working as a machinist at Mare Island from 1968-80 on the submarines for which Metalclad brokered the Unibestos to the Navy.

Metalclad argued the plaintiff's claims are precluded under the government contractor defense, which shields military contractors from state tort law liability for defects in military equipment supplied to the United States. Specifically, Metalclad met the three elements of the government contractor defense: 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 the United States. Metalclad further argued the plaintiff's claims for negligent and strict liability failure to warn fail because it would have been impossible for Metalclad to warn the plaintiff of the hazards of Unibestos; even if Metalclad had placed its own warning on the product, that warning would not have prevented the plaintiff's exposure. The court agreed and granted summary judgment.

The plaintiff argued that the application of the government contractor defense was misapplied. The Court of Appeals disagreed, noting that the First District Court of Appeal for Division 1 had ruled on an almost identical appeal by the same law firm representing Mr. Wanlass. That matter was filed on behalf of another plaintiff, Gary Kase. In both cases, the underlying orders by Judge Jackson granting the motions were filed on November 27, 2013. The orders are substantially identical.

In affirming, this court noted, "The Kase opinion comprehensively vindicated Judge Jackson's decision as to the scope of the government contractor defense to the same claims also made here by Wanlass. The opinion is thorough, its reasoning unanswerable. Because we cannot improve on Kase's analysis, we adopt it as our own."

The court continued, "…Wanlass does not dispute that the Unibestos was manufactured by Pittsburgh Corning, not Metalclad; that Metalclad was simply the "broker [ ]" who procured Unibestos for the Navy from Pittsburgh Corning; and that Pittsburgh Corning provided warnings on the packages of Unibestos. Despite this limited relationship, Wanlass argues that Metalclad was nevertheless under an obligation to add its own warnings. But Wanlass is unable to produce one authority imposing a duty to warn upon a party that is in effect merely a shipping agent of a finished product manufactured by a third party and was never in physical possession of the finished product."

Read the full decision here.

Possibility of Exposure Not Enough to Overcome Summary Judgment Motions of Brake Manufacturers and Supplier

(Court of Appeals of Kentucky, June 2, 2017)

Decedent Bobby Vickery died of mesothelioma and his estate was substituted as a party to this action. The plaintiff estate appealed the granting of summary judgment to defendants Eaton Corporation, ArvinMeritor, Pneumo-Abex, and Brake Supply Company. The appellate court affirmed, with one judge dissenting.

The plaintiff alleged Mr. Vickery was exposed to asbestos from a variety of different sources. He had fifty employers between 1966 and 2003, and alleged asbestos exposure during three of those jobs. For purposes of this appeal, the court summarized his alleged exposure as follows. First, during his work at Coleman Auto Parts, Mr. Vickery picked up new parts from NAPA and delivered them to regional NAPA stores. He also hauled used brake cores to the Rayloc facility. Plaintiff presented evidence that Abex made 99 percent of the brake linings sold to Rayloc. Second, Mr. Vickery worked for Riley Trucking Company where he replaced brakes on Chevrolet, GMC, Mack, and International-Harvester trucks. During this time Eaton and Rockwell International Corporation made original equipment used on Mack, GMC, and International-Harvester trucks; Arvin-Meritor acquired the assets and liabilities of Rockwell. Third, Mr. Vickery alleged asbestos exposure while installing insulation during his work for Fortner LP Gas Co., Inc.

Under Kentucky law, "the proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor." The word "impossible" is to be used in a practical sense, not an absolute sense. All of the plaintiff's claims of negligence, strict liability, negligence, and breach of warranty require proof that the product was the legal cause of Mr. Vickery's injury.

Here, Dr. Arthur Frank testified there was no safe level of exposure to asbestos, and every exposure to asbestos was a substantial factor in causing the plaintiff's disease. The defendants argued this evidence was insufficient to establish that Mr. Vickery's individual exposures to asbestos were a substantial factor in causing his mesothelioma, due to a Sixth Circuit ruling holding that the plaintiffs must show a high enough level of exposure to infer that the asbestos was a substantial factor in the injury was more than conjectural. The trial court rejected Dr. Frank's opinion, finding that Dr. Frank's standard would render the substantial factor test meaningless.

The appellate court distinguished this case from the Sixth Circuit ruling relied upon by the defendants, because that case was a directed verdict, not a summary judgment. "For purposes of summary judgment, we disagree that a single exposure to a known carcinogen can never be sufficient to establish legal causation." Further, the plaintiff presented other expert testimony to show that Mr. Vickery's multiple exposures to asbestos dust were of a sufficient level to substantially contribute to his mesothelioma. However, the court stated that the more significant issue in this case was whether the plaintiff met its burden of showing that Mr. Vickery was exposed to asbestos dust made by each of the defendants.

The evidence showed that Mr. Vickery was exposed to brake linings from both Abex and multiple other unknown manufacturers. It was equally likely that his mesothelioma was caused by exposure to an unknown manufacturer's product. Thus, the plaintiff could not show that his exposure to Abex's asbestos was a substantial cause. Regarding Rockwell, there was no evidence concerning the make or manufacturer of the brakes on which Mr. Vickery worked while at Riley Trucking. While Brake Supply sold asbestos-containing parts to Riley Trucking, there was no evidence that Mr. Vickery was exposed to asbestos dust while installing new brakes. At most, the plaintiff only presented evidence showing a possibility that Mr. Vickery was exposed to asbestos through Eaton, Rockwell, and Abex products.

One judge dissented on the basis that summary judgment was prematurely granted without providing the plaintiff a reasonable opportunity to conduct discovery, and because the majority opinion did not fully address the causation standard to be applied in mesothelioma cases.

Read the full decision here.

Summary Judgment Reversed in Finding Co-Worker Testimony Personal Knowledge, Not Hearsay

(Court of Appeals of Ohio, Ninth District, Summit County, May 31, 2017)

Plaintiff Ruth Williams filed suit against multiple defendants, including Akron Gasket, as a result of her late husband's development of mesothelioma. Specifically, the plaintiff alleged that Mr. Williams was exposed to asbestos tape made by Akron while working at PPG Industries and Goodyear Tire and Rubber. Summary judgment was granted in favor of Akron. The plaintiff appealed, arguing that the trial court erred in finding that co-worker testimony was hearsay and that medical causation could not be proven.

The court began its analysis by reminding of the standard for summary judgment. Summary judgment is appropriate when 1) there is no material issue of fact in dispute 2) the movant is entitled to summary judgment and 3) viewing the evidence most strongly in favor of the non-moving party, the reasonable person would conclude the moving party is entitled to summary judgment. Of course, the burden falls upon the moving party. As for an asbestos case, the plaintiff has the burden to prove exposure to asbestos "that was manufactured, supplied, installed, or used by the defendant and that the product was a substantial contributing factor in causing the plaintiff's injury." Here, the plaintiff took the position that the trial court erred in deciding the testimony of Mr. Williams' co-worker was not based on personal knowledge and was therefore hearsay. Reviewing the case de novo, the court noted that the evidence showed a different picture. Specifically, the co-worker testimony demonstrated a dispute as to material issue of fact as to whether Akron Gasket supplied Goodyear with asbestos containing tape. The trial court found that the co-worker's knowledge was based on what had been relayed to him by his supervisors. The court disagreed that that was the source of his knowledge. Rather, his knowledge was based on his own recollection of the company's name being stamped on the tape. Akron argued that the co-worker's testimony on "common knowledge" as to asbestos containing products was hearsay. The court disagreed and pointed out that without meeting its evidentiary burden, this argument creates the very issue of fact in dispute. Hence the reason summary judgment.

The plaintiff also argued that the trial court should not have denied summary judgment on a finding that the plaintiff could not sustain her burden as to substantial factor. The trial court did not consider her experts' affidavits on causation. The trial court reached this conclusion since it had decided the plaintiff could not meet substantial factor through the co-worker's testimony. The court noted that because that decision was "built upon the court excluding the co-worker's testimony" the issue on causation was also made in error. The court declined to review the third asserted error on the issue of weighing the evidence in a light most favorable to the plaintiff. Accordingly the court reversed and remanded.

Read the full decision here.

Summary Judgments Based on Wisconsin Safe Place Statute and Statute of Repose Denied

(U.S. District Court, Eastern District of Wisconsin, May 15, 2017)

The court issued another decision in a case originally reported in Asbestos Case Tracker on May 15, 2017. Plaintiffs Daniel and Beverly Ahnert originally filed a case in 2010 alleging Daniel Ahnert developed asbestosis; that case was transferred to the MDL of the Eastern District of Pennsylvania. In 2013 Beverly Ahnert filed a new case in the Eastern District of Wisconsin after Daniel Ahnert died of asbestos-related diseases. In September 2014, the 2011 case was remanded back to Wisconsin. The plaintiff then moved to consolidate the 2010 case with the 2013 case. The court deferred the ruling until outstanding motions for summary judgment were decided in the 2013 case. After various rulings, in March 2017 this court denied the pending summary judgment motions and granted plaintiff's motion to consolidate. Here, the court decided Wisconsin Electric's summary judgment arguments regarding whether the Safe Place Statute and the Wisconsin Construction Statute of Repose (SCOR) barred the plaintiff's claims, and denied both.

The plaintiffs alleged Wisconsin Electric was the owner or operator of premises where asbestos products were used; Daniel Ahnert worked at three Wisconsin Electric facilities. The court provided an extensive summary of the evidence produced before analyzing the applicable law. The Wisconsin Safe Place statute created a non-delegable statutory duty for premises owners, distinct from legal obligations arising under common law. The statute provided that every employer shall furnish safe employment for employees, including furnishing safety devices and safeguards. Owners need not guarantee absolute safety, but "'must provide an environment as free from danger to the life, health, safety, or welfare of employees and frequenters as the nature of the premises reasonably permit.'" In addition, case law focused on the condition of the structure causing the injury; generally, there were three unsafe property conditions –

structural defects; unsafe conditions associated with the structure of the building; unsafe conditions not associated with the structure. Wisconsin case law has held that the release of asbestos dust during regular repair created an unsafe condition sufficient to support a claim that the premises owner violated this statute.

Here, Wisconsin Electric relied upon the contract with Babcock & Wilcox requiring it to remove any asbestos prior to Daniel Ahnert's employment. Wisconsin Electric argued it had no duty under the Safe Place Statute because it did not supervise or control Daniel Ahnert. However, the duty under the Safe Place Statute was non-delegable, thus the law did not support this argument. Further, a genuine dispute of material fact existed regarding whether unsafe conditions existed on the premises.

The Wisconsin Statute of Repose limited the time in which plaintiff could bring an action for injury resulting from improvements to real property. However, Wisconsin Electric did not meet its burden to show that Daniel Ahnert's injuries resulted from work intended to make improvements to real property. The defendant did not submit sufficient evidence to show that his work on the boiler systems was an improvement to real property, and not just maintenance.

Read the full summary here.

Sufficient Exposure Found to Reverse Prior Summary Judgment Decision in Favor of Asbestos Supplier

(Superior Court of New Jersey, Appellate Division, May 17, 2017)

In October 2010, the plaintiff, Thomasina Fowler, individually and as administrator of the estate of Willis Edenfield (the decedent), brought a wrongful death and product liability action in the Superior Court of New Jersey against various defendants. The plaintiff alleged the decedent passed away from mesothelioma caused by asbestos exposure associated with defendants' products. The complaint was filed after the decedent's death and he was never deposed. Therefore, during discovery, the plaintiff produced two witnesses to testify as to the decedent's occupational history. The decedent worked at a chemical plant from 1954-94, which manufactured asbestos-containing adhesive products.

The defendant supplier, along with other supply companies, allegedly supplied asbestos to this chemical plant. One fact-witness, Rodney Dover, testified that asbestos was present at the facility and recalled the defendant as one of the suppliers. Dover further testified that the decedent, as part of his job responsibilities, "scooped, weighed, and mixed the necessary ingredients, including asbestos." The other fact-witness, Lucius Boyd, worked at this chemical plant prior to the time the defendant was a supplier. However, he further confirmed the chemical plant used asbestos while the decedent was employed there.

Following the completion of discovery, the defendant moved for summary judgment, which was granted. In reaching this decision, the trial court found "insufficient evidence the decedent was exposed to defendant's asbestos while working at the chemical plant." The plaintiff's counsel appealed and argued that the order should be vacated because "the evidence is sufficient to create a genuine issue of material fact as to whether decedent . . . was exposed to respirable asbestos from [defendant]'s products." [Citation Omitted].

Upon review of the evidence, the Appellate Court agreed with the plaintiff. Here, the court emphasized that the trial judgment cited *Provini* when granting the defendant's summary judgment motion. However, unlike the plaintiff in *Provini*, who could not provide evidence of the work the decedent performed, the plaintiff in the case at bar presented testimony, from co-workers, specifically describing decedent's job responsibilities at the chemical plant. Also, unlike *Provini*, who presented no evidence the decedent was actually exposed to asbestos, the testimony established the decedent's work involved frequent, direct contact with asbestos. The plaintiff was not merely claiming asbestos was present within the building the decedent worked in but the decedent frequently handled asbestos while performing his daily job duties. [Citation Omitted]. The court also noted that the plaintiff presented evidence that the defendant provided asbestos to the chemical plant over a 12-year period while the decedent was employed at the chemical plant and handled asbestos. This was enough to satisfy at least enough evidence to survive a motion for summary judgment in that a reasonable jury could infer the decedent suffered exposure to defendant's asbestos.

Accordingly, the trial court's order granting summary judgment was reversed.

Read the full decision here.

Deere Granted Summary Judgment Based on Speculation Tractor Contained Asbestos Parts it Manufactured

(Superior Court of Delaware, May 10, 2017)

The Superior Court of Delaware issued another ruling in a case reported in Asbestos Case Tracker on May 15, 2017. In this ruling, the court granted defendant Deere & Company's motion for summary judgment. The decedent died from lung cancer. Counsel stipulated that his asbestos exposure occurred from 1955-79. Prior to his death, the decedent gave a deposition stating that he worked on "older" John Deere tractors from 1953-79. This work included grinding head gaskets once per year or every other year. Replacement parts came from John Deere dealers. He also changed clutches on older Deere tractors and performed some brake work.

Deere argued the decedent affirmed multiple times that he did not work on Deere farm equipment until after 1979. Further, there was no evidence that decedent changed the original equipment on the tractors, the plaintiff did not present evidence of the brand of parts replaced, and provided an affidavit which stated companies other than John Deere sold aftermarket parts that fit the models decedent worked upon. The plaintiff offered Deere's discovery responses which stated that Deere bought asbestos containing components from third party suppliers.

The court granted Deere's summary judgment based upon North Carolina law requiring the plaintiff to establish actual exposure to an asbestos-containing product manufactured, sold, or distributed by the defendant. This case was analogous to prior asbestos matters granting summary judgment upon similar facts. Here, a reasonable juror, beyond speculation, could not infer that the "older" Deere tractors had asbestos parts made by Deere. Deere submitted evidence that it purchased parts from multiple third parties. Like prior case law, "Plaintiff did not know the maintenance history of the 'older' Deere tractors, whether they were serviced before he worked on them, or if the replacement parts were Deere products beyond his boss telling him that he purchased the parts from the Deere dealer."

Read the full decision here.

No New Facts Alleged in Plaintiff's Motion for Reargument; Reargument Denied

(Superior Court of Delaware, May 11, 2017)

On February 2, 2017 the Superior Court of Delaware granted defendant Georgia Southern University Advanced Development Center's (Herty) motion for summary judgment. The plaintiffs since filed a motion for reargument and reconsideration of that order. Dorothy Ramsey alleged that Herty, a manufacturer of an asbestos paper product, negligently failed to warn her of the risks of take-home asbestos exposure due to her husband's workplace exposure from 1976-80. The plaintiff alleged that Herty's failure to warn of the danger was a proximate cause of the decedent's lung cancer.

A motion for reargument under Delaware Superior Court Civil Rule 59(e) permits the court to reconsider "its findings of fact, conclusions of law, or judgment. …" "Delaware law places a heavy burden on a [party] seeking relief pursuant to Rule 59." To prevail on a motion for reargument, the movant must demonstrate that "the Court has overlooked a controlling precedent or legal principles, or the Court has misapprehended the law or facts such as would have changed the outcome of the underlying decision." Further, "[a] motion for reargument is not a device for raising new arguments," nor is it "intended to rehash the arguments already decided by the court."

In the plaintiff's current motion to reconsider, the plaintiff does not argue any newly discovered evidence or a change of law. The plaintiff contended that the court misapprehended the law and facts relevant to Herty's original summary judgment motion. Ultimately, the court found that the arguments contained in the plaintiff's motion to reconsider were exhaustively considered in the underlying summary judgment motion. The court notes that the plaintiff's dissatisfaction with the ruling does not give rise to a right for a reconsideration. The court concluded by stating, "Plaintiff's Motion disagrees with that conclusion, but this does not entitle her to reconsideration of that decision, particularly in the absence of any new or supplemental authority on this issue."

Read the full decision here.

Ford Granted Summary Judgment in Two Automotive/Tractor Cases in Delaware

(Superior Court of Delaware, May 10, 2017)

Ford was granted summary judgment in two matters pending in the Superior Court of Delaware.

First, plaintiff Paul Norris brought suit against Ford Motor Company alleging that he developed an asbestos related disease as a result of his occupational and non-occupational exposure to asbestos while performing work on Ford brakes, clutches, and gaskets. The plaintiff started working on his father's farm in 1960, which included work on a Ford tractor. The plaintiff testified that the new brakes and clutches used for his tractor work were purchased from a Ford dealer. Additionally, he believed the 1960 Ford tractor was new. The plaintiff also testified that he performed engine work on his personal vehicles, including Ford vehicles. Based on Mr. Norris' testimony, Ford filed for summary judgment.

The Superior Court of Delaware applied Tennessee substantive law in this matter. Under Tennessee law, the threshold requirement of any asbestos case is proof that an injured plaintiff was exposed to friable asbestos from a product for which a defendant is responsible. Where there is more than one potential cause of an injury, a plaintiff must show that a particular defendant's conduct was "a substantial factor causing the injury." Thus, in order to be the proximate cause of a plaintiff's injuries, a defendant's negligent act need not have been the whole cause or the only factor in bringing them about.

The court granted summary judgment in this matter, finding that the plaintiff could not demonstrate he was exposed to friable asbestos from a Ford product. The plaintiff's only testimony was that he purchased replacement parts for the tractors at a Ford dealer. There was no evidence that the plaintiff removed any Ford parts. Thus, a jury would have had to speculate that the clutches, brakes, and gaskets Mr. Norris removed were in fact manufactured by Ford. In granting the motion, the court noted, "Because Plaintiff failed for provide evidence, beyond speculation, that Mr. Norris worked with Ford brakes, clutches, and gaskets, summary judgment is appropriate."

In the second matter, Nathanial Harris brought a suit against Ford Motor Company alleging that he developed lung cancer as a result of his occupational exposure to asbestos while performing work as a farmer between 1949 and 1992 at Cobb Farm in North Carolina. During the period of 1953-79, Mr. Harris worked on Ford tractors at Cobb farm. Mr. Harris believed he was exposed to asbestos during that period when he performed grinding on the head gaskets and manifold gaskets, performed clutch work, and did brake jobs on the tractors. Mr. Harris believed the parts were manufactured by Ford because the parts had "Ford" stamped on them. However, Mr. Harris' could not identify the specific brand of the parts he removed and installed for the majority of his work. Based on the lack of specific product identification testimony, Ford filed for summary judgment.

The Superior Court of Delaware applied North Carolina Substantive law to this matter. In North Carolina, a plaintiff is required to establish "actual exposure to an asbestos-containing product manufactured, sold, or distributed by the defendant." A plaintiff must provide evidence demonstrating that Plaintiff was exposed to an "offending" product. The exposure must be more "than a casual or minimum contact with the product containing asbestos in order to the hold the manufacturer of that product liable. Instead, the plaintiff must present 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." Thus, in any asbestos case, a plaintiff must (1) identify an asbestos-containing product for which a defendant is responsible, (2) prove that he has suffered damages, an (3) prove that defendant's asbestos-containing product was a substantial factor in causing his damages.

The court granted Ford summary judgment. In Mr. Harris' testimony, he was not able to identify the brand of parts he installed or removed. As such, the court noted that, "a reasonable juror could not infer, beyond speculation, that Plaintiff worked with a Ford asbestos products."

Read the *Norris* decision here. | Read the *Harris* decision here.

Decedent's Work Falls Outside Wisconsin's Statute of Repose; Summary Judgment Denied

(U.S. District Court for the Eastern District of Wisconsin, May 11, 2017)

This matter stems from a series of filings. In 2010, plaintiffs Daniel and Beverly Ahnert filed an asbestosis claim on February 25, 2010. That case was transferred to Multidistrict Litigation in the Eastern District of Pennsylvania. Two and a half years later, Beverly Ahnert, as the executrix of the estate of Danial Ahnert, filed a new complaint in the Easter District of Wisconsin alleging that Daniel Ahnert passed away as a result of an asbestos related disease. This matter deals with defendant Sprinkmann Sons, Inc. and Employers Insurance Company of Wisconsin's Motion for summary judgment on issues not addressed in the case pending in the MDL in the Eastern District of Pennsylvania, specifically causation and punitive damages. The remaining issue related to the application of the Wisconsin Construction Statute of Repose and the Safe Place Act (CSOR).

On January 6, 2016 the Eastern District of Wisconsin denied Sprinkmann's motion for summary judgment, finding that genuine issues of material fact preclude summary judgment on the issue of whether Wisconsin's CSOR bars the plaintiffs' claims. CSOR (Wis. Stat. § 893.89), limits the time in which a plaintiff may bring an action for injury resulting from improvements to real property. The purpose of the CSOR is to "provide protection from long-term liability for those involved in the improvement to real property." The exposure period runs ten years from the date immediately following the substantial completion of the improvement (Citation omitted).

The primary issue in this matter is what constitutes an improvement. The Wisconsin Supreme Court has defined an improvement as a "permanent addition to or betterment of real property that enhances its capital value and that involves the expenditure of labor or money and is designed to make the property more useful or valuable." To prevail on the motion for summary judgment, then, Sprinkmann had the burden of establishing that its work was an improvement, as defined by case law. Sprinkmann attempted to classify decedent's work of removing and installing insulation at a plant constituted an "improvement." The court did not agree. The court found that a fact-finder could determine that removing old insulation and replacing it was simply maintenance. Depending on the type of insulation, this work could need to be repeated periodically over the years. This is a factual issue and Sprikmann has not provided sufficient facts to establish that their work is an improvement as required by CSOR. As such, Sprinkman did not meet their burden of establishing that the CSOR bars the plaintiffs' claims as a matter of law.

Read the full decision here.

Compound Manufacturer's Directed Verdict Reversed

(Appellate Court of Illinois, First District, Second Division, May 9, 2017)

The estate of decedent Ronnie Startley filed a complaint against multiple defendants, including Welco Manufacturing Company, alleging that the defendants' products caused the decedent to contract mesothelioma. All defendants except Welco either were dismissed or settled with plaintiffs prior to trial. Welco proceeded to trial. After trial, the trial court directed a verdict in favor of Welco, holding that there was not sufficient evidence to create an issue of material fact as to whether the use of Welco's products caused the decedent to develop mesothelioma. The plaintiffs appealed the trial court's decision to the First District Court of Appeals of Illinois.

The decedent worked finishing drywall primarily in Alabama. In 1965, he moved to Illinois with his family and worked with his cousin, Walter Startley, for three or four months before returning to Alabama. Walter was the plaintiff's only witness to provide product identity while the decedent worked in Illinois. Walter testified he recalled a few brands of joint compounds used by the decedent, however, he could not specifically recall which brands were used on which site and how frequently each product was used.

The trial court found that the plaintiff had not met its burden and granted Welco's Motion for Directed Verdict. In arriving at its decision the court stated, "[T]here's very minimal product identification in this case. There is no testimony to support frequency of the [use of] defendant's product. There's no testimony to support repeated exposure to the defendant's product." The Court of Appeals disagreed. In its opinion, the court found that although Walter could not say how frequently he and the decedent used a Welco product for their work in Illinois, he did testify that they used it for some of their jobs. This was sufficient to create an issue of material fact as to whether the decedent's exposure to a Welco product was a substantial factor in the decedent contracting mesothelioma. The case was remanded for a new trial.

Read the full decision here.

Coke Ovens are Real Property and Not Subject to Product Liability Theories

(Supreme Court of the State of New York, May 5, 2017)

Defendant Honeywell International, Inc., successor in interest to Wilputte Coke Oven Division of Allied Chemical Corporation, appealed from an order denying its motion for summary judgment. The plaintiff sought damages for injuries sustained by decedent Donald Terwilliger from asbestos exposure and coke oven emissions while employed at Bethlehem Steel in Lackawanna, New York. The court reversed and granted Honeywell's motion.

Honeywell was sued as the successor to Wilputte Coke Oven Division of Allied Chemical, the designer and builder of five coke oven batteries at Bethlehem Steel. Honeywell argued that the coke oven batteries were not products for purposes of product liability theories, and the transaction between Wilputte and Bethlehem was one for services, not goods.

Prior case law concluded, with regards to coke oven batteries, that by common-law standards these structures were real property due to their size and permanent attachment to the land. Honeywell described the intense process to construct the batteries. In light of this process, the court determined that the transaction between Honeywell and Bethlehem Steel was a contract for services, rather than for the sale of a product. "We further conclude that a coke oven, installed as part of the construction of the 'great complex of masonry structures' at Bethlehem (citations omitted), permanently affixed to the real property within a coke oven battery, does not constitute a 'product' for purposes of plaintiff's products liability causes of action…".

Read the full decision here.

Automotive Manufacturer Had No Duty to Warn Regarding Third Party Replacement Parts

(Supreme Court of Delaware, April 21, 2017)

The plaintiffs alleged Ford Motor Company was negligent in failing to warn decedent of the dangers posed by servicing asbestos brake parts in Ford vehicles. The decedent was a mechanic who died of mesothelioma. Ford moved for summary judgment, arguing that Ford had no duty to warn about asbestos replacement brake parts made by third parties, and the plaintiffs failed to produce evidence that decedent was exposed to Ford asbestos brake parts. The trial court ruled that Ford had no duty to warn about third party replacement parts, but denied the remainder of the motion. After a jury trial verdict in favor of Ford, the plaintiffs appealed the summary judgment ruling that Ford had no duty to warn regarding third party suppliers. The appellate court affirmed.

The plaintiffs argued Ford had a legal duty to warn about the vehicle as a whole, not just component parts, because the vehicle was designed to work with asbestos-containing component parts. Ford responded with the "bare metal" defense 0151 a manufacturer has no duty to warn about potential dangers from exposure to a part of its product if the manufacturer did not make or distribute the part.

The court did not address the central question of the appeal — whether an automobile manufacturer such as Ford had a duty to warn about the dangers associated with replacement parts made by third parties for use in Ford vehicles. Since the jury determined that Ford was not negligent in failing to warn about original and replacement Ford parts, Ford could not be negligent in failing to warn about third party parts. The court accepted Ford's point — that any error was harmless in light of the jury's finding that Ford was not negligent. Since the jury found no duty, it did not reach the issue of causation.

Read the full decision here.

Roofing Cement Manufacturer Granted Summary Judgment Based on Insufficient Evidence of Exposure

(Superior Court of Delaware, New Castle, April 4, 2017)

Plaintiffs Henry Stowers and his wife Laura Stowers filed suit in the Superior Court of Delaware, New Castle County, alleging that Henry Stowers was exposed to asbestos from various defendants' products which caused his lung cancer. Stowers, as the plaintiffs' sole product identification witness, testified that between 1985-87, Stowers was a self-employed roofer. His work included building cabinets and removing/placing old shingles on roofs with new ones. Stowers stated that the new shingles were made by Owens-Corning and Heritage but he was aware of the manufacturer of the roof felt he used. He also did not know the manufacturer of the old roof materials he removed. He stated that he used Bird roofing cement around the openings of pipes that came through the roof. He applied the cement with a trowel, and cleaned the trowel with a buffing wheel attached to a grinder which created black dust that he breathed in.

The defendants filed for summary judgment and argued that the plaintiffs cannot show the roofing cement released asbestos fibers under Oklahoma law. The plaintiffs argued that there was a genuine issue of material fact that Stowers lung cause is a result of his exposure to the defendant's roof cement. The plaintiffs further presented evidence from interrogatories that Bird, Inc. admittingly made and sold asbestos-containing roofing products.

Under Oklahoma law, plaintiffs in asbestos-related injury cases "must prove that the product was the cause of the injury; the mere possibility that it might have caused the injury is not enough." [Citation Omitted]. A plaintiff must establish that there was a "significant probability" that a defendant's products caused their injuries. [Citation Omitted].

Upon its review, the court found that the plaintiffs failed to meet this standard and could not demonstrate beyond speculation that there is a significant probability, under Oklahoma law, that the defendant's product caused Stowers' injuries. The court emphasized that the only evidence the plaintiffs offered demonstrating that Stowers worked with asbestos roof cement was from the defendant's answer to Interrogatories. The answer states that Bird manufactured asbestos containing roof cement; however, there is no evidence in the record linking Stowers to the defendant's asbestos containing roof cement beyond speculation. [Citation omitted].

Therefore, the defendant's summary judgment motion was granted.

Read the full decision here.

Federal Court Grants Summary Judgment on Failure to Warn Claims

(U.S. District Court for the Northern District of Ohio, Eastern Division, April 4, 2017)

Plaintiff Gail Hart, executor of the estate of the decedent Alva Coykendall (the plaintiff), filed suit alleging that her husband worked with a substantial amount of asbestos-containing brake and clutch friction materials manufactured by various defendants. Prior to his death, Coykendall was deposed and testified that he did work as an uncertified mechanic from approximately 1972 through 2014. Coykendall further specified he performed work on brakes and clutches which included exposure to brake dust when working on vehicles that did not require a full brake change. Coykendall estimated to changing clutches on vehicles between "one hundred and twenty and one thousand times." He was diagnosed with mesothelioma in July 2014 and passed away eight months later.

Several defendants filed for summary judgment on the basis of, among other things, that the plaintiff failed to prove that the defendants' alleged failure to warn or inadequate were the proximate cause of his injuries. This Court addressed failure to warn claims under *Ohio Revised Code §2307.76(A)(1)* which states that a product is "defective due to inadequate warning or instruction at the time of marketing if, when it left control of the manufacturer, both of the following applied:

> (a) the manufacturer knew or, in the exercise of reasonable care, should have known about a risk that is associated with the product and that allegedly caused harm for which the claimant seeks to recover compensatory damages; and
>
> (b) the manufacturer failed to provide the warning or instruction that a manufacturer exercising reasonable care would have provided concerning that risk, in light of the likelihood that the product would cause harm of the type for which the claimant seeks to recover compensatory damages and in light of the likely seriousness of the harm.

In the case at bar, Colykendall testified during his deposition that he did not read any of the warnings that were on the parts he used as a mechanic, and that he "probably" would not have changed his practices based upon any warnings that would have been provided. Therefore, Coykendall's own testimony provided affirmative and uncontradicted evidence rebutting the general presumption of causation in this case.

The court further noted that once defendants have provided some evidence to rebut the presumption of causation, plaintiffs "may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." *See Fed. R. Civ. P. 56(e).* The mere existence of a scintilla of evidence in support of the plaintiff's position is insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. [Citation Omitted].

In this case, however, the plaintiffs provided absolutely no testimony or other evidence that would suggest that a warning, of any type, would have caused Mr. Coykendall to stop using the asbestos containing products, or caused him to use any additional precautions to avoid exposure to any asbestos containing dust emanating from these products. Rather, the plaintiffs simply asked the court to find that the mere existence of a rebuttable presumption, is sufficient as a matter of law to preclude summary judgment no matter what evidence may exist to rebut that presumption. They cited no law to support this proposition.

The court ultimately found that there was no evidence that could support a finding that any warning provided by the defendants in this case would have altered Coykendall's exposure to or interactions with the asbestos containing products. As a matter of law, therefore, he could not prove that the alleged failure to warn or inadequate warnings

were the proximate cause of his injury. Therefore, summary judgment was granted in favor of the defendants on the claim of inadequate warning or instruction.

Read the full decision here.

Required Use of Asbestos Products for Proper Functioning of Steam Turbines Created Genuine Issue of Material Fact Regarding Duty to Warn

(Court of Appeals of Washington, April 3, 2017)

The decedent served in the Navy from 1943-46 and served as a machinist on the USS George K. MacKenzie during World War II. After the war, he joined the Military Sea Transportation Service and worked as an engineer until 1952. His representatives filed a wrongful death lawsuit after he died from mesothelioma, suing, among others, General Electric. The trial court granted GE's motion for summary judgment, and the appellate court reversed.

GE designed, manufactured, and supplied the steam turbines that were on board the decedent's three ships in the 1940s and 1950s. GE argued it did not have a duty to warn about the hazards of asbestos-containing products that it did not manufacture, sell, or supply. GE's corporate representative testified that there was no indication that GE procured, designed, or installed thermal insulation on the turbines and GE did not provide any insulation. Further, the standard practice was that insulation was the shipyard's responsibility. The plaintiff argued that GE had a duty to warn about the hazards of asbestos products that had to be used with the steam turbines. The plaintiff submitted various documents showing that the decedent was exposed to asbestos-containing products, and that these products had to be used for proper functioning of the steam turbines.

The court analyzed the cases cited by the plaintiffs and GE in support of their respective arguments. Ultimately, the court concluded that general issues of material fact precluded summary judgment on whether GE had a duty to warn. Unlike the cases cited by GE, in this case, the evidence showed that asbestos-containing insulation, gaskets, and packing products were necessary for the steam turbines to function as designed. Like the case cited by the plaintiff, asbestos products were required for proper functioning of the turbines.

GE also argued that even if it had a duty to warn, the plaintiffs could not prove causation because there was no evidence decedent was exposed to asbestos used in conjunction with GE turbines. However, the record did not support this argument. Plaintiffs may establish exposure through circumstantial evidence, and the factors outlined by the Washington Supreme Court to determine evidence of causation were satisfied in this case.

Read the full decision here.

Plaintiff's Assertion of the Mere Possibility of Exposure Insufficient to Create a Triable Issue of Fact for Summary Judgment

(Court of Appeal of California, First Appellate District, Division One, March 30, 2017)

The plaintiff filed suit against multiple defendants, including Moore Drydock, alleging he developed mesothelioma as a result of his work onboard the USS Carter Hall. The plaintiff further alleged that defendant Moore Drydock built the USS Carter Hall. Specific sources of exposures alleged by the plaintiff included gaskets, packing, and pipe insulation.

The defendant moved for summary judgment, arguing that no issue of fact existed. The plaintiff opposed and took the position that the declaration of its insulation expert, Charles Ay, offered the fact that portions of the original insulation were on the USS Carter Hall when the plaintiff served aboard in the 1960s. The trial court granted summary judgment. The plaintiff appealed.

The court noted its standard of review for summary judgment appeal is de novo. The plaintiff argued that the defendant did not shift the burden to the plaintiff. The defendant argued that the plaintiff's discovery responses lacked any fact that the plaintiff had worked around asbestos containing equipment for which the defendant was responsible. The plaintiff conceded that they had no personal knowledge of exposure to the defendant's products but that void does not satisfy the burden upon the defendant that the plaintiff could not garner evidence related to the cause of action. The court disagreed and found the defendant met its prima facie showing that the plaintiff "did not and could not obtain admissible evidence necessary to show causation." Specifically, the court found the case to be similar to the *Andrews* case where the plaintiff's discovery responses also contained general allegations of exposure. The court found that the responses were essentially a concession that the plaintiff had no further information or facts. After the burden shifted, the plaintiff had the burden of production to prove that an issue of material fact existed. Here, the

plaintiff argued that Ay's declaration that original asbestos was still onboard the USS Carter Hall satisfied that requirement. However, the court pointed out that Ay did not have personal knowledge regarding the building of the USS Carter Hall as Ay did not serve onboard that ship until years after its construction. The court stated that the threshold question is whether exposure to the defendant's product is a fact at issue. "If there has been no exposure, there is no causation." The court also pointed out that the *Dumin* and *Shiffer* decisions also granted summary judgment for testimony that did not raise an issue of fact or where the inference was one where exposure "would be only as likely or even less likely."

Accordingly, summary judgment was affirmed.

Read the full decision here.

Plaintiff's Objections to Magistrate's Recommendation for Granting Summary Judgment Overruled

(U.S. District Court for the District of Delaware, March 31, 2017)

The plaintiff filed objections to the Magistrate's recommendation for granting summary judgment, arguing that his expert's affidavit was enough to create an issue as to material fact.

The court began its analysis and stated that its review of objections to a magistrate's decision are de novo. The issue at heart was the plaintiff's reliance on the *Boyd* case to support his claim that the affidavit of his expert, Captain Bulger, established an issue of fact. The court found that the affidavit only "bolstered" was had been established in that decision. According to the court, the plaintiff had not cited anything other than circumstantial evidence. Consequently, the recommendation was affirmed.

Read the full decision here.

Click here to read Asbestos Case Tracker's summary of the Magistrate's decision.

Plaintiffs Survive Summary Judgment as to Turbine and Valve Defendants; Fail to Establish Exposure to Other Equipment Defendant

(U.S. District Court for the District of Connecticut, March 31, 2017)

The defendants moved for summary judgment arguing that the plaintiff, Paul Paquin, had not established that he was exposed to any asbestos containing product for which the defendants were responsible. The court launched into its analysis with the standard for summary judgment and stated that summary judgment is not appropriate unless "the court determines that there is no genuine issue of material fact to be tried and that the facts as to which there is no such issue warrant judgment." The parties disputed whether maritime law or the Connecticut Product Liability Act applied. The court noted that both require the plaintiff to "demonstrate that the defendants manufactured or distributed a defective product, that the defect existed at the time the plaintiff utilized the product, that the plaintiff was exposed to that defective product without adequate warning or protection, and that exposure to the defective product caused his injury."

Crane and CBS (Westinghouse): Both Crane and CBS argued that the plaintiff had no evidence that the plaintiff was exposed to either defendant's equipment or products. However, the court disagreed and stated that a material issue of fact had been established. Here, the plaintiffs put forth an affidavit from Charles Knapp which identified products and/or equipment manufactured by both Crane and CBS. The affidavit went as far as to explain how the equipment was insulated and that each defendants' equipment was utilized on every submarine built or repaired at Electric Boat. Additionally, the affidavit described the loose lagging that came off equipment and became airborne. Accordingly, the motions were denied.

Foster Wheeler: The court granted Foster Wheeler's motion for summary judgment. Although the affidavit as to Foster Wheeler was similar to the others in differed in one crucial aspect. Here, the affidavit went only as far as to say that Foster Wheeler's equipment was on many submarines at Electric Boat. It did not state that the equipment was on all. Accordingly, summary judgment was granted.

Read the full decision here.

Summary Judgment Granted to Valve Manufacturer Based on Insufficient Evidence of Exposure

(Superior Court of Rhode Island, March 13, 2017)

The plaintiff filed suit in the Superior Court of Rhode Island, Providence for personal injuries and wrongful death alleging plaintiff's decedent use of asbestos products with defendant's valves were foreseeable to the defendant and, under a negligence theory, the defendant failed to warn of the associated hazards.

The defendant moved for summary judgment under Maine Law, to which both parties agreed upon, on November 16, 2016, and argued that the plaintiff failed to offer, and have no reasonable expectation of offering any evidence that plaintiff's decedent was exposed to an asbestos-containing product manufactured by the defendant. The defendant further argued that, "even if Maine law allowed liability to third-party component products, the plaintiff failed to provide sufficient evidence that any products manufactured or supplied by the defendant even contained asbestos.

The plaintiff opposed the defendant's motion arguing that the defendant admitted it sold asbestos-containing valves from 1858, and that it only discounted this practice in the mid-1980s. The plaintiff further asserts that defendant was negligent and breached its duty when it failed to warn of the dangers of asbestos in either its own products or products used in conjunction with the defendant's products.

Upon review of the evidence presented, the Supreme Court of Rhode Island, Provide found that defendant had met its burden by demonstrating that "Plaintiff had not alleged sufficient exposure to an original asbestos-containing product of the defendant." [Citation Omitted]. The court outlined that the Supreme Judicial Court of Maine, under Maine law, stated that a plaintiff must provide sufficient evidence of product nexus in order to survive summary judgment. *See Grant v Foster Wheeler*, LLC, 140 A3d 1242, 2016 ME 85 (2016). The court went on to define product nexus as 1) a defendant's asbestos-containing product, 2) at the site where the plaintiff worked or was present, and 3) where the plaintiff was in proximity to that product at the time it was being used. Id. The court went further to state that a plaintiff must not only prove that the asbestos product was used at the worksite, but also that the employee inhaled the asbestos from the defendant's product. *Id.*

Accordingly, this court found that evidence of a mere possibility of exposure to a potential asbestos-containing product is not enough to overcome summary judgment, and courts have declined to proceed with such an analysis when a plaintiff cannot make a threshold showing of product nexus.

Read the full decision here.

Collateral Estoppel Applied to Bar Second Asbestos Case Against Crane by Same Plaintiff

(U.S. District Court for the Eastern District of Missouri, March 8, 2017)

The decedent, a civilian employee for the United States Navy from 1958-1964, died from mesothelioma. Prior to passing he brought suit in St. Louis City, Missouri, in December 2015, which the defendants removed to federal court. His representatives continued the suit after he passed. Defendant Crane Co. filed a motion to dismiss based upon collateral estoppel. The court granted this motion.

In December 2009, the decedent brought an action against Crane and others in Massachusetts based upon asbestosis. Crane filed a motion for summary judgment in that case based upon lack of identification, which the court granted in August 2012. The 2015 Missouri lawsuit asserted identical claims to those in the Massachusetts case.

At the outset, the court affirmed the Eighth Circuit's implied endorsement of the use of a motion to dismiss to raise res judicata. Res judicata encapsulates two preclusion concepts — issue preclusion (collateral estoppel) and claim preclusion. Collateral estoppel means that "once a court has decided an issue of fact or law necessary to its judgment, 'the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.'" Due to the full faith and credit clause of the Constitution — 28 U.S.C. § 1738 —Massachusetts law determined the preclusive effect of the parties' previous litigation.

Under Massachusetts law, collateral estoppel applied when (1) there was a final judgment on the merits in the previous adjudication, (2) the party against whom estoppel is asserted is a party (or in privity with a party) to the prior adjudication, (3) the issue decided in the prior adjudication is identical with the one presented in the current adjudication, and (4) the issue decided in the prior adjudication was essential to the judgment. The guiding principle was whether the party lacked full and fair opportunity to litigate the issue in the first action.

Here, the first two elements were met. The third element was also met, even though the decedent's current claims had two differences — additional exposures in the second case, and the second cases alleges wrongful death instead of asbestos. However these two differences did not alter the nature of the claims, and the court disagreed with the plaintiffs' assertion that Crane provided insufficient information regarding the identity of the claims presented in both cases. Regarding the fourth element, decedent had a full and fair opportunity in the previous case to litigate the claim that Crane's products caused his injuries.

Read the full decision here.

Lack of Factual Basis for Plaintiffs' Assertion of Causation Yields Grant of Summary Judgment

(Court of Appeal of California, Second Appellate District, March 2, 2017)

After the decedent died of mesothelioma, her husband and adult son filed a wrongful death and survivorship complaint against numerous defendants. W.W. Henry Company, predecessor to the Henry Company (who was also named and not a party to this motion) filed a motion for summary judgment based upon lack of exposure. The appellate court affirmed the trial court's granting of this motion.

The plaintiffs alleged exposure to asbestos from the early 1970s-early 1980s during the decedent's work as an art teacher and sculptor, and from home remodeling performed in 1980. Interrogatory responses identified the decedent's husband installing, scraping, and removing asbestos-containing roofing mastic made by W.W. Henry Company. The plaintiff testified he associated W.W. Henry with "Henry roof compounds," used Henry's roof compound on his house, and that the decedent did not help him with roofing work but did his laundry.

W.W. Henry Company filed a motion for summary judgment, relying on the plaintiffs' factually devoid responses to comprehensive discovery requests and a declaration from an industrial hygienist stating that neither the plaintiff nor the decedent was exposed to asbestos from W.W. Henry Company products. Whether the roofing cement contained asbestos was unconfirmed and if it was present, the fibers would be encapsulated. In response, the plaintiffs argued that the defendant did not satisfy its threshold burden.

The court relied upon California supreme court opinions holding that a defendant may meet his initial burden by simply pointing out "that the plaintiff does not possess, and cannot reasonably obtain, evidence that would allow such a trier of fact to find [causation] more likely than not." Further, evidence that the defendant propounded sufficiently comprehensive discovery requests and that the plaintiff provided factually insufficient responses can raise an inference that the plaintiff cannot prove causation.

Here, the plaintiff could not identify the brand name or trade name of any W.W. Henry Company product he allegedly used on the roof, and he could not recall the type of product it was. No evidence showed the product used was made by W.W. Henry Company, versus Henry Company. No evidence supported the presence of asbestos in the roofing product. Aside from the plaintiff's testimony, the plaintiffs produced no admissible evidence creating a triable issue of material fact. As such there was no factual basis for the plaintiff's general assertion of causation, and summary judgment was affirmed.

Read the full decision here.

Federal Court Grants Summary Judgment for Automotive Defendant for Lack of Causation

(U.S. District Court for the District of Delaware, February 16, 2017)

Plaintiffs Stephen and Marilyn Charlevoix brought this asbestos-related action against various defendants, including Fiat Allis North America, on July 10, 2015, in the Delaware Supreme Court. They alleged that Stephen Charlevoix developed mesothelioma as a result of naval and occupational exposure to asbestos between 1961 and 1978. During this time, Charlevoix worked as boiler tender, maintenance worker, and equipment installer. Charlevoix also ran his

own logging business from the late 1960s up until the filing of the lawsuit at issue. The case was removed to the U.S. District Court for the District of Delaware on August 21, 2015.

Mr. Charlevoix's deposition was conducted on December 15, 2015 and additional co-workers were deposed on May 24, 2016 and May 26, 2016. During Mr. Charlevoix's deposition, he identified Fiat as the manufacturer of a front-end loader vehicle, which he used in the operation of his logging business. However, further testimony regarding this vehicle, including any asbestos-containing components was limited. Co-worker testimony also did not identify Fiat with any asbestos containing products.

Fiat moved for summary judgment on September 30, 2016. The plaintiff failed to oppose the motion and on January 9, 2017, Fiat further sought dismissal from the court in light of the plaintiffs' non-response.

In addressing this motion, the court first noted that a plaintiff's failure to respond is not alone a sufficient basis for the entry of a summary judgment. Even where a party does not file a responsive submission to oppose the motion, the court must still find that the undisputed facts warrant judgment as a matter of law. In other words, the court must still determine whether the unopposed motion for summary judgment has been properly made and supported.

In the case at bar, as a federal court sitting in diversity is required to apply substantive law of the state whose laws govern the action, both parties agreed that Michigan substantive law applied to all land-based claims, which included those against Fiat. Under Michigan law, a plaintiff must establish that a particular defendant's conduct was a substantial factor in causing the plaintiffs injury. The frequency and intensity of exposure to asbestos-containing products, in the scope of the entire work history, should be considered in determining whether the defendant's conduct was a substantial contributing factor. Moreover, the plaintiff must show the manufacturer's asbestos product was used at the specific site within the workplace where the plaintiff worked. It is not enough for the plaintiff to show that the defendant's product was present somewhere at his workplace.

After reviewing all the evidence, the court recommended granting Fiat's motion for summary judgment. Although Mr. Charlevoix testified that he owned a Fiat vehicle, the following evidence was not sufficient to establish a genuine issue of material fact as to whether Mr. Charlevoix was exposed to an asbestos-containing product made by Fiat:

- Mr. Charlevoix testified that he had the engine overhauled in the vehicle, in which he removed and reinstalled the engine;
- Mr. Charlevoix did not testify that he was exposed to any asbestos in the course of that work;
- Co-worker testified that gaskets had to be removed during the engine overhaul process, and that Mr. Charlevoix was present during the removal;
- Co-worker did not know who manufactured the gaskets that were removed or who manufactured the gaskets that were installed; and
- Co-worker did not know the composition of the gaskets and could not say if they contained any asbestos.

Therefore, the deposition testimony of Mr. Charlevoix and Mr. Milligan failed to create a material issue of fact as to whether, under Michigan law, Fiat's products were a substantial contributing factor to Mr. Charlevoix's injury. Summary judgment was granted.

Read the full decision here.

New York Court Finds No Successor Liability and Grants Defendant's Summary Judgment Motion

(Supreme Court of New York, New York County, February 8, 2017)

In this NYCAL asbestos action, plaintiff Ivette Montanez alleged that she developed malignant mesothelioma as the result of washing her brother's laundry. Montanez's brother, Eliud Hernandez, Jr., testified to working with Beck/Arnley brakes at a friend's automobile ship in Puerto Rico when he was 15-17 years old. Defendant Beck Arnley Worldparts, Inc. moved for summary judgment, arguing, among other things, that it was not the successor to the product alleged to have caused the exposure.

The key issue to this motion centered on successor liability and whether any of the seller's owners required a direct or indirect interest in the buyer under an asset purchase where no stock was exchanged. The plaintiffs ultimately argued that a more flexible standard should apply to de facto mergers in the context of tort actions. The plaintiffs further asserted that summary judgment should be denied even in the absence of issues of fact regarding ownership,

because the defendant received a “continuing benefit” from the asset purchase through the hiring of, and activities of, Max Dull, a former owner of the Beck/Arnley company.

Judge Peter H. Moulton found while there may be good reasons for adopting a different test for successor liability in the context of an asbestos case, the law, as it presently exists, requires that the proponent of a de facto merger demonstrate a continuity of ownership. Under New York law, continuity of ownership is “the touchstone of the de facto merger concept” and thus a necessary predicate to a finding of a de facto merger. [Citation Omitted]. While this might be unfair in instances where, as here, the plaintiffs submitted evidence that (1) Beck/Arnley Worldparts Corp. did not continue to exist in a meaningful way after the asset purchase (having been stripped of any way to generate income) and (2) the defendant knew of asbestos lawsuits and Beck/Arnley Worldparts Corp. failed to set aside sufficient monies to pay for them, any finding that other indicia could substitute for continuity of ownership must come from the appellate courts.

Accordingly, the defendant’s summary judgment motion was granted.

Read the full decision here.

Expert Affidavit Does Not Create a Question of Fact for Nonmoving Party in Motion for Summary Judgment

(U.S. District Court for the District of Delaware, February 8, 2017)

On February 8, 2017, the United States District Court for the District of Delaware granted Defendants Crane Co., Warren Pumps LL, and Air & Liquid Systems Corporation (Buffalo) separate motions for summary judgment with regards to all causation counts of the plaintiff’s complaint.

The plaintiff asserted state law causes of actions against the defendants based on David MacQueen’s (the decedent) employment in the U.S. Navy. The decedent was aboard the U.S.S. Randolph and the U.S.S. Independence from 1956-60. The plaintiff alleged that Crane, Warren, and Buffalo were manufacturers of asbestos containing equipment that was aboard the U.S.S. Randolph and the U.S.S. Independence at the same time the decedent served on those vessels.

Under federal law, summary judgment is appropriate where “the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” In order to defeat a motion for summary judgment, the non-moving party must “do more than simply show there is some metaphysical doubt as to the material facts (citation omitted) .” The dispute is genuine only where evidence is such that a reasonable jury could return a verdict for the nonmoving party.

The key issues in this matter is whether the plaintiff can meet the above burden with respect to causation; that is, whether there is a nexus between the decedent’s work on the previously reference ships and any work with any asbestos-containing product associated with any of the defendants. In a products liability action under maritime law, such as this one, a plaintiff proceeding under either a negligence and/or strict liability theory must establish causation by showing, “for each defendant, that (1) he was exposed to the defendant’s product, and (2) the product was a substantial factor in causing the injury he suffered.”

In the discovery phase of this matter, three product identification witnesses were deposed. None of the three witnesses offered factual information that would allow the court to infer that Mr. MacQueen was ever exposed to any of the defendants’ products on either the U.S.S. Randolph or the U.S.S. Independence. The defendants cited this lack of product identification in their respective motions. The plaintiffs attempted to counter and establish a factual controversy based on the expert affidavit of Captain Francis Berger. This affidavit was disclosed for the first time in the plaintiff’s opposition to the pending motions. Captain Burger concludes that, based on his review of certain naval records, certain products manufactured by defendants Crane, Buffalo, and Warren were on board the U.S.S. Randolph and U.S.S. Saratoga between 1956 and 1960. However, Captain Burger never personally knew the decedent.

The court did not find that Captain Burger’s expert affidavit met the above standard required of a nonmoving party in a summary judgment motion. The court commented that the Burger Affidavit cannot create a fact issue as to at least one additional element of the “exposure” prong regarding causation: whether Mr. MacQueen was exposed to an asbestos-containing product manufactured or supplied by the Defendants. Captain Burger simply does not have any personal knowledge; perhaps he could create a fact as to the presence of the products, but he simply cannot testify that Mr. MacQueen was actually exposed to any of these products. Based on the evidence provided, the court could

not infer that Mr. MacQueen worked on or was exposed to the defendants' products and granted all defendants' motions for summary judgment with regards to causation.

It should be noted, there was an additional count for conspiracy. The body of the count repeatedly asserts liability as to not only Metropolitan, but also as to "Defendants." Two of the defendants did not address this count in their motions for summary judgment. As a result, the court could not grant summary judgment and those counts remain.

Read the full decision here.

Automotive Parts Manufacturers Granted Summary Judgment in Secondary Exposure Case

(Court of Appeal of California, February 2, 2017)

The plaintiff sued various automotive parts manufacturers, alleging secondary asbestos exposure from the work of his father, a mechanic. The plaintiff had been diagnosed with mesothelioma. The plaintiff's father worked at Bekins warehouse from June 1974-May 1982, where he did brake, clutch, and engine gasket repair. The plaintiff visited his father at work, helped him at work, and father's clothes were washed at home. Products identified in discovery included: two Ford trucks; four International semi-truck tractors; Rockwell axles; Carlisle brake linings; Grizzley brake linings (Maremont, or ArvinMeritor); International replacement parts. Various defendants moved for summary judgment, which was granted by the trial court and affirmed here.

The court provided a lengthy summary of the evidence for and against summary judgment and summarized the legal standards applicable to asbestos exposure cases. The court agreed with the trial court that the defendants satisfied their initial burden in showing that the plaintiff provided factually devoid responses to comprehensive defense interrogatories. Here, the plaintiff's interrogatory responses stated that Bekins trucks used Rockwell asbestos-containing brake linings, Rockwell sold these linings under truck manufacturers' brand names, and Father used manufacturer replacement brake linings. However, evidence that Rockwell's OEM brake assemblies had asbestos parts when first manufactured did not establish exposure absent evidence that Father performed the initial brake job on the trucks. The plaintiff's evidence did not support even a likelihood that Father did. Further, Rockwell was ***a*** supplier, not ***the*** supplier (emphasis added).

The trial court did not err in finding there were no triable issues of fact. Since the plaintiff's father did not start at Bekins until 1974, five of the six trucks were too old for his father to have sustained exposure to OEM products. The evidence that his father was exposed to OEM products from the sixth truck, a 1975 International, was too speculative. In reaching these conclusions, the court provided an extensive analysis of the evidence provided. It also pointed out that the ultimate factual issue was whether the plaintiff himself was exposed to OEM products.

The plaintiff argued evidence supported that Rockwell, Maremont, and Carlisle were suppliers of replacement parts, and this was sufficient to support an inference that Father was exposed to asbestos from these products. The court cited case law which found evidence of exposure when one supplier provided the asbestos products; here, the percentages of each defendant's products was unknown: "…the evidence shows that Defendants were among multiple suppliers and thus does not support an inference that Johnson probably encountered asbestos from Defendants' products."

The plaintiff also argued ArvinMeritor was liable on a design defect theory; the court found this argument legally untenable. Accepting the plaintiff's argument would, by logical extension, making every vehicle produced by any manufacturer during the period before non-asbestos friction materials became generally available defective by design, simply by virtue of incorporating asbestos materials in third party component parts. The court quoted the Supreme Court: "'…the reach of strict liability is not limitless.'"

Read the full decision here.

Summary Judgment Granted to Asbestos Paper Products Manufacturer in Take-Home Exposure Case Based on No Duty to Warn

(Superior Court of Delaware, February 2, 2017)

Plaintiff Dorothy Ramsey, through her estate, alleged that the defendant Georgia Southern University Advanced Development Center (Herty) negligently failed to warn her of the risks of take-home exposure to Herty's asbestos paper products used at her husband's work from 1976-80. She alleged this exposure caused her to develop lung cancer. The defendant moved for summary judgment, arguing it did not owe Plaintiff a duty of care. The central issue in this case was whether *Price v. E.I. DuPont de Nemours & Co*. and *Riedel v. ICI Americas Inc.* applied to the facts of this case, as both dealt with claims of negligence asserted against the employer of the plaintiff's spouse. The court found that both cases applied. Consistent with both, the court found that the plaintiff alleged claims of nonfeasance; as such, a special relationship was required between her and the defendant, which was not shown. Summary judgment was granted.

The plaintiff's husband worked for Haveg, which used both Herty's and other manufacturer's asbestos paper in making pipe and pipe fittings. The court examined centrally whether Herty owed the plaintiff a duty of care. Herty argued the plaintiff's allegations were properly characterized as alleged failures to act, or nonfeasance. As such, Herty only owed a duty of care to the plaintiff if she stood in a special relationship with Herty, which she did not. The plaintiff argued this case was distinguishable and should be analyzed under general principles of tort law; Herty's affirmative act of making and releasing an asbestos product into the stream of commerce created a duty of care to all foreseeable plaintiffs.

The issue here was a novel one — did *Price* and *Riedel* limit take-home exposure cases to ones in which the plaintiff-spouse alleged the employer failed to take adequate steps to protect the plaintiff, or were they equally applicable to where a manufacturer supplied an asbestos product that posed a risk of household exposure to the employee's spouse? The court outlined both parties' approaches to this issue and found no duty of care.

Although courts addressing the duty of care in this context have taken divergent positions on the issue of whether an employer owes a duty to warn the employee's spouse of the risks of take-home asbestos exposure, these courts implemented various approaches from *Price* and *Riedel*. However, Delaware law under *Price* was clear — employers owed no duty of care for failing to take steps to protect employees' spouses from dangerous conditions on its property and transported home unless plaintiffs identified a special relationship between the parties. Here: "The Court finds that the analytical framework implemented in *Price* and *Riedel* is equally applicable to the facts of the present case. Those cases involved analogous claims of take-home asbestos exposure asserted by a spouse against her husband's employer. The key difference in this case—that Herty is a manufacturer and not Plaintiff's husband's employer—undermines, rather than bolsters, Plaintiff's contention that Price and Riedel are distinguishable. This is clear when Plaintiff's argument is outlined to its logical conclusion." Therefore, the plaintiff cannot state a valid negligence claim against her husband's employer, Haveg, without first identifying either (1) the employer's misfeasance, or (2) the employer's nonfeasance and special relationship. The manufacturer which supplied asbestos products to the employer was a distant third party. "Distilled to their essence, Plaintiff's allegations epitomize nonfeasance."

Read the full decision here.

Fire Door Manufacturer Obtains Summary Judgment in NYCAL; No Duty to Warn Against Latent Dangers from Unforeseeable Use of Product

(Supreme Court of New York, January 30, 2017)

Defendants International Paper Company and Owens-Illinois, Inc. moved for summary judgment, which was granted. All Craft Fabricators, Inc. was hired to do millwork in refurbishing the United Nations headquarters. The general contractor issued a change order to use salvaged wood panels and doors from the Under-Secretary General's office. These materials were resized and cut for use as interior cabinets at the United Nations building. External testing performed by All Craft showed that the dust from these materials contained asbestos.

An affidavit from a professional engineer stated that the asbestos in these materials was neither a contaminant nor a waste, but an integral component; these doors were to be used as fire doors. The defendants moved for summary judgment based on prior New York law holding that a valve manufacturer was not liable for injuries sustained due to asbestos exposure from dismantling or salvaging scrap metal from valves. The defendants argued that this was salvage work. The plaintiffs argued the defendants failed to provide any admissible evidence sufficient to establish

summary judgment, as various items — a letter from the United Nations office, the change order, and an OSHA investigation report — were hearsay. The plaintiffs thus argued the defendants failed to establish that the refurbishment work was an unforeseeable use of their product.

The court agreed that while many of the documents were inadmissible, the engineer's affidavit established that All Craft cut the panels with saws and blades. Although the plaintiffs submitted affidavits regarding the meaning of the term "salvaged," this did not change the fact that as part of refurbishing, the materials were cut with saws and blades. The court stated: "… a manufacturer has no duty to warn against latent dangers that do not result from foreseeable uses of its product… Defendants have proved that Plaintiffs did not use defendants' product in a way it was intended or in a reasonably foreseeable manner. Cutting into the wood panels and doors is not an intended use of the product."

Read the full decision here.

In Bystander Exposure Case, Plaintiff Failed to Demonstrate that Defendant Had a Duty to Warn

(Court of Special Appeals of Maryland, January 27, 2017)

Plaintiff Daniel Hiett developed mesothelioma and alleged bystander exposure from his father's work. The plaintiff alleged negligence and strict liability claims based on a failure to warn theory. The circuit court granted defendant AC&R Insulation Company, Inc,.'s (AC&R) motion for summary judgment. The plaintiff appealed, arguing that several material facts distinguished their case from *Georgia Pacific, LLC v. Farrar*, 432 Md. 532 (2013), which held that a manufacturer/distributor of a product containing asbestos did not owe a duty to warn the household member of a worker-bystander who was present at facilities where the asbestos-containing product was installed prior to 1972 and where protective clothing, changing rooms, and safe laundering were not available at the work sites. The court found that the facts in this case did not distinguish it from *Farrar* to the extent that a duty to warn was warranted, and affirmed the circuit court's judgment.

The court provided an extensive analysis and summary of *Farrar*. At the outset the court clarified the scope of *Farrar*'s ruling regarding foreseeability, in that *Farrar* did not set out a *per se* rule that take-home asbestos was not foreseeable to any defendant prior to 1972. The plaintiff argued the facts of this case differed in from those in *Farrar* enough to establish a duty.

First, with regard to whether AC&R had actual knowledge of bystander risk prior to 1972, the plaintiff cited many of the same studies discussed by the *Farrar* court. Other articles cited by the plaintiff did not specifically discuss take-home exposure. Second, the plaintiff failed to present facts different from *Farrar* demonstrating that AC&R could have feasibly implemented a warning prior to 1972 to household members. Third, the plaintiff argued the fact that changing rooms were available (unlike *Farrar*) was enough to distinguish this case. However, the plaintiff's father would still arrive home with asbestos-laden clothes to wash. Fourth, although AC&R was on-site (contrary to Georgia Pacific in *Farrar*), and could have given a verbal warning, it was difficult to understand how AC&R could have controlled the asbestos dust. While the plaintiff's family could have found alternative work, so could every worker in every case. Fifth, absent facts establishing an actual relationship between the household member and defendant, the court did not think the *Farrar* court intended to invite "the level of plaintiff-focused micro-analysis" that plaintiff suggested. "Whether or not a distributor/installer owes a duty to a class of individuals with whom the company has no relation, must depend necessarily on the facts that pertain to *all* the class members. *Farrar* would be a bagatelle if household members could circumvent its holding by submitting merely an affidavit stating that the intermediary-bystander would have responded to a warning by independently taking the steps necessary to protect his or her household members." Finally, the court rejected the plaintiff's claim that household members were a determinate class of plaintiffs, because the same rational could then apply all other individuals with whom the bystanders could come into contact.

Read the full decision here.

Summary Judgment Affirmed Against School Board Where Exception to Immunity Applied

(Commonwealth Court of Pennsylvania, January 25, 2017)

The plaintiffs filed suit against 40 defendants and the Pittsburgh School District Board of Public Education (PBE). The plaintiffs contended the defendants were responsible for Ms. Geier contracting mesothelioma while she worked as a school teacher at South Hill High School from 1959-59. During discovery, Ms. Geier stated in an affidavit that she was occupationally exposed to 1) pipe coverings, 2) floor tile, 3) drywall, and 4) joint compound.

At the close of discovery, PBE moved for summary judgment and asserted the defense of governmental immunity under the Torts Claims Act. Specifically, PBE argued that it was immune from the plaintiff's claim under the Utility Service Facilities section of the Tort Claims Act. Exceptions applied when: A dangerous condition of the facilities of steam, sewer, water, gas, or electric systems owned by the local agency and located within the rights of way, except that the claimant to recover must establish the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred. Also, that the local agency had actual notice or could reasonably be charged with notice under the circumstances of the dangerous condition at a sufficient time prior to the event to have taken measures to protect against the dangerous condition. The court honed in on the implied argument by the plaintiff that the real property exception was also at issue. With that exception, immunity may not be asserted where the property was "a facilities of steam, sewer, water, gas and electric systems owned by the local agency and located within the rights of way." The trial court denied summary judgment.

On appeal, PBE argued that as a "local government agency", it was immune to suit under the Tort Claims Act. Plaintiff on the other hand, argued that PBE breached its common law duty of care in creating a safe work place for Ms. Geier. However, none of the eight exceptions to immunity applied. Therefore, it was immune according to PBE. Moreover, even if the utility services exception applied, the plaintiff had not proved that PBE had knowledge of a dangerous condition. According to PBE, the trial court erred in denying summary judgment.

The plaintiff countered and took the position that PBE, under common law and as a property owner, owed a duty of care to keep Ms. Geier safe from dangers. Further, PBE had a duty to discover those dangers according to the plaintiff.

In its analysis, the court stated it rejected "PBE's defense that the Plaintiffs failed to identify the rights of way that contain utility service facilities in question." Specifically, the court noted that the utility services were found within PBE's building. However, the court agreed that the exception only applied if the plaintiff put forth evidence that PBE had knowledge of the dangerous condition. Here, Ms. Geier had testified that she "had no knowledge that any PBE employee or representative was aware of the potential hazards of asbestos at South High School during the 1958-1959 school year."

The court examined the real property exception and found that "dangerous condition" was not written into the exception for real property. Instead, the exception applies a standard of negligence in real property. Relying on the recent *Tooey* decision, the court concluded that PBE owed Ms. Geier the duty of a business invitee which is the highest duty owed for entry upon land. Here, Ms. Geier had testified that she saw men mixing bags of powder with water from the school water fountains. She recalled seeing joint compound and asbestos on the bags. Also, men installed floor tiles to repair old cracked tiles. Of note, the court pointed out that it was unclear from the record whether the issue of notice of a dangerous condition was before the trial court. Although PBE raised that issue on appeal, the court was not "convinced the notice issue was part of the trial court's denial of summary judgment." Accordingly, the court declined to reverse on the issue of notice.

Based on the holding in *Tooey*, the court found that it "is possible for a local agency to be liable to an employee for workplace exposure to asbestos dust, if the condition causing the exposure falls within one of the exceptions to governmental immunity. Here, the evidence was sufficient that the plaintiff had alleged a dangerous condition from PBE's use of asbestos containing products within its utility services and real property. Denial of summary judgment was affirmed.

Read the full decision here.

Plaintiff's Inconsistent Testimony is an Issue for Trial; Summary Judgment is Denied

(Superior Court of Delaware, New Castle, January 17. 2017)

On January 17, 2017, the Superior Court of Delaware, New Castle denied RCH Newco II LLC's (Newco) motion for summary judgment. The plaintiff, Jessie Hastings, alleged that he contracted colon cancer as a result of his exposure to Newco's asbestos-containing product, Galbestos. Galbestos was a material that protected metal and roofing products. Mr. Hastings was the only product identification witness and testified in two depositions.

In his first deposition, Mr. Hastings testified that he began working at DuPont's Chestnut Run facility in 1951-52. He testified that he did not recall working with asbestos material at this facility, but was around other trades that may have used asbestos-containing products. He continued that he was later a foreman at Chestnut Run and another DuPont facility known as the Experimental Station. Mr. Hastings also testified that he came into contact with insulated panels at DuPont's Glasgow Pencader site for six months in the 1980s. At that time, he could not recall the manufacturer of the panels. Last, Mr. Hastings testified that he was an ironworker foreman at Lukens Steel in 1985. Mr. Hasting's work history sheet listed the presence of Galbestos at Lukens, however, Mr. Hastings did not identify any manufacturers of asbestos-containing material at Lukens.

A month later, Mr. Hastings gave his second deposition. However, when Plaintiff's Counsel asked if Mr. Hastings associated any products at Chestnut Run, he testified, ""We put aluminum siding on it. I can't think of the name of it now. I don't know. It was a, corrugated siding. It had a coating, kind of brownish-red coating on it. Hmm. Fab, Fabestos or something like that." The plaintiff's Counsel interjected, and asked if he meant, "Galbestos?" Mr. Hastings affirmed that Galbestos was the name of the product. Mr. Hastings stated the he never personally cut the siding but he supervised other ironworkers doing so. He further testified that the siding work was a small percentage of time compared to his other tasks.

Newco filed for summary judgment contending that: (1) Mr. Hastings' testimony is internally inconsistent partially as a result of an impermissible leading question from his lawyer and does not create a genuine issue of material fact; and (2) absent his inconsistent testimony on Galbestos exposure, he cannot state a valid claim under Delaware law to survive summary judgment on the issue of product nexus. Under Delaware's product nexus standard, the plaintiff is required to "proffer some evidence that not only was a particular defendant's asbestos containing product present at the job site, but also that the plaintiff was in proximity to that product at the time it was being used." This "time and place standard" requires plaintiff show "some evidence" of both "daily and continuous proximity" to defendant's product for more than a de minimis period of time.

The court analyzed Mr. Hastings' testimony using the reasoning of *Edmisten v. Greyhound Lines, Inc.* In *Edmisten*, The court held that, where the "plaintiff's testimony is so inconsistent that no reasonable juror could accept it, that testimony will not be credited as raising a genuine issue of material fact to overcome a defendant's summary judgment motion." The court distinguished this matter from *Edmisten* stating, "Hastings' testimony does not reach the level that no reasonable juror could accept his recollection of his expo-sure."

While the testimony is inconsistent, those inconsistencies should be addressed at trial, the plaintiff presented some evidence that Mr. Hastings was exposed to Galbestos at several jobsites. The court found Newco did not meet its burden of proving no genuine issues of material fact existed and accordingly denied Newco's motion for summary judgment.

Read the full decision here.

Summary Judgment Affirmed Where Plaintiff Fails to Demonstrate the Frequency, Regularity, or Proximity of Decedent's Alleged Exposure

(Superior Court of Pennsylvania, January 19, 2017)

Appellant James Floyd, Jr.'s Father, James Floyd Sr. (the decedent), passed away after he was diagnosed with mesothelioma. Mr. Floyd alleged that the decedent was exposed to various asbestos-containing products, including AstenJohnson, Inc.'s dryer felts, while the decedent was employed at Sun Oil from 1939-1951 and at Scott Paper from 1951-1984. AstenJohnson made dryer felts used on paper machines that contained asbestos until 1980. Appellant provided deposition testimony that he worked with the decedent at Scott Paper from 1977-1984. Appellant testified that the decedent replaced dryer felts approximately twice a year. Appellant testified that Scott Paper was dusty, however, he could not testify more specifically where the dust came from. Additionally, Appellant supplied the

testimony of Alan Koronkiewicz from two unrelated asbestos cases. In those depositions, Koronkiewicz testified that the felts at Scott Paper were made by three different manufacturers, including AstenJohnson. All of the asbestos felts Koronkiewicz opened from the 1950's through the 1970's were made by AstenJohnson. However, Koronkiewicz could not identify the decedent specifically.

On October 28, 2015, the Court of Common Pleas of Philadelphia County in Pennsylvania granted AstenJohnson's motion for summary judgment. In doing so, the court applied the standard from *Kraus v. Trane U. S. Inc*. Kraus states that in order for a plaintiff to defeat a motion for summary judgment, a plaintiff must present evidence to show that he inhaled asbestos fibers shed by the specific manufacturer's product. Therefore, a plaintiff must establish more than the presence of asbestos in the workplace; he must prove that he worked in the vicinity of the product's use. Summary judgment is proper when the plaintiff has failed to establish that the defendants' products were the cause of plaintiff's injury. In granting AstenJohnson's motion, the court commented that Appellant's testimony is insufficient to show (1) the dryer felt the decedent worked with was an AstenJohnson felt; (2) the decedent inhaled dust from any of the felts; (3) the felts the decedent worked with contained asbestos.

This standard requires a plaintiff attempting to defeat a motion for summary judgment to present evidence concerning "the frequency of use of the product and the regularity of plaintiff's employment in proximity thereto. The trial court, in evaluating this evidence concerning frequency, regularity and proximity of exposure, must then make a reasoned assessment of whether a jury would be justified in making "the necessary inference of a sufficient causal connection between the defendant's product and the asserted injury." (citation omitted)

Appellant appealed that decision, arguing that sufficient evidence existed from which a reasonable jury could infer that the decedent's mesothelioma was caused by his exposure to AstenJohnson's asbestos containing dryer felts. The court of appeals disagreed. The court found the trial court properly relied on *Sterling v. P & H Mining Equipment*. Sterling held, "that summary judgment is proper in an asbestos case where plaintiff's only evidence consists of plaintiff's personal belief that dust contains asbestos and the testimony of co-workers who were unable to note the frequency, regularity, or proximity of plaintiff's alleged exposure to asbestos." The appellate court noted that because the Koronkiewicz testimony could not identify the decedent in this matter, it provides no information regarding the frequency, regularity, and proximity of the decedent's alleged exposure. As such, the Appellant failed to adduce sufficient evidence to support the inference that the decedent inhaled asbestos from AstenJohnson's dryer felts. Thus, the trial court properly entered summary judgment in favor of AstenJohnson.

Read the full decision here.

New Jersey Court Finds Plaintiff's Certification Speculative and Grants Defendant's Summary Judgment Motion

(Superior Court of New Jersey, Middlesex County, January 10, 2017)

Plaintiff John Burton filed suit in the Superior Court of New Jersey, Middlesex County, against various defendants, including Ingersoll Rand, alleging he developed mesothelioma from occupational exposure to asbestos during his work at a New Jersey facility that manufactured aluminum cans. During his discovery deposition, Burton testified that the production of aluminum cans required a washing system to which the facility had two "washing machines" that incorporated washing and decorating the cans. Burton recalled these washing machines had 12 pumps and testified generally that Ingersoll Rand was one of three manufacturers of these pumps. Burton alleges exposure through the service and repair of these pumps, working with original equipment manufacturer parts (OEMs), specifically gaskets.

Defendant Ingersoll Rand filed for summary judgment and the plaintiff opposed. On January 5, 2017, pursuant to procedures within New Jersey asbestos litigation, the court issued a tentative decision to deny the motion. After oral argument went forward on January 6, 2017, the court reserved its decision, and later issued a written ruling on January 10, 2017.

The crux of this motion centered on whether there was sufficient evidence to show that the Ingersoll Rand pumps that Burton allegedly repaired actually contained asbestos-containing parts. The plaintiff used Burton's discovery deposition and certification as proofs. Burton's deposition testimony revealed that kept an occupational journal, which was contemporaneous with the relevant years of his alleged exposure, and identified Ingersoll Rand as one of the pump manufacturers he worked with. However, Burton could not recall any model or serial number, color, marking, or even a nameplate for an Ingersoll Rand pump. The court noted that this lack of knowledge, in itself, some 30 years after the fact, would not defeat summary judgment.

The critical analysis in determining the actual exposure focused on defense counsel's cross examination of Burton. Here, Burton acknowledged he was unable to provide any information as to anyone from his facility ordering any asbestos containing product from a New Jersey Ingersoll Rand facility. In support of its opposition to this motion, the plaintiff provided a certification on behalf of Burton that attempted to bolster this testimony. This certification referred back to OEMs stored in the facility's storeroom, and Burton certified that, if there was a breakdown of a pump or he was performing preventative maintenance, and gasket materials were needed, he would obtain asbestos-containing sheet gaskets from the local supply house. Burton alleged he was not asked whether the OEM replacement gaskets on pumps he repaired contained asbestos, and if that question was asked, he would have testified they did contain asbestos.

When considering Burton's certification as support to the plaintiff's opposition, the court emphasized that Ingersoll Rand's counsel painstakingly broke down Burton's testimony and questioned him further regarding ordering OEMs from the facility's storeroom. As this issue was already addressed and Burton confirmed he had no information, the certification was found to be speculative at best.

Accordingly, in reaching a decision, the court found no testimony that gave a reasonable inference that the storeroom at Burton's facility was stocked with OEM parts, specifically gaskets. While Burton does recall Ingersoll Rand as one of three pump manufacturers and this was supported by a notation from his journal entry, he could not provide any further evidence of asbestos exposure associated with defendant Ingersoll Rand. And for those reasons, the court granted the defendant's motion for summary judgment.

Read the full decision here.

Death of Statutory Beneficiary During Pendency of Jones Act Claim Did Not Extinguish Jones Act Claims; Estate Could Recover Benefit

(U.S. District Court for the Eastern District of Pennsylvania, January 5, 2017)

Defendant Thompson Hine filed a motion for summary judgment, arguing that the plaintiff's Jones Act survival claims abated due to no statutory beneficiary. The court denied the motion.

The plaintiff alleged that the decedent, Joseph Braun, was exposed to asbestos during his work aboard ships owned by the defendants and died from an asbestos-related disease. This case was originally filed in 1989 and asserted claims under the Jones Act and general maritime common law. In April 2011, the case was transferred to MDL 875 as part of the consolidated asbestos products liability multidistrict litigation. During the pendency of this action, the decedent's wife also died. The record was unclear regarding whether the decedent had further next of kin dependent upon him. Thompson Hine argued there was now no statutory beneficiary to the survival claims, as the Jones Act only permitted claims to proceed where the recovery was distributed to a surviving spouse, child, parent, or next of kin who was dependent upon the decedent.

The parties agreed that maritime law governed the claims. The Jones Act incorporated FELA's substantive recovery provisions — every common carrier shall be liable in damages to any person suffering injury while in their employ; if the employee died, the carrier shall be liable to the employee's personal representative, surviving spouse, children, and next of kin dependent upon the employee. The plaintiff argued they identified a statutory beneficiary who was alive at the time of filing, and the death of this beneficiary during the pendency of the Jones Act action did not extinguish the cause of action. The defendant conceded that the Jones Act wrongful death claim did not abate, but the survival claim did.

In examining the record, the court noted that the defendant did not establish the lack of a living statutory beneficiary; there was no evidence that the potential beneficiary identified by the plaintiff — possibly decedent's daughter-in-law, or perhaps a granddaughter or niece – was deceased or not dependent upon decedent. Even if there were no living statutory beneficiary, defendant's motion still failed because the case law cited by defendant did not support the proposition that the estate itself could not recover damages. While the court recognized that it could not expand the class of beneficiaries statutorily permitted by Congress, other courts have concluded that where claimant died before the claim was processed, the estate of the claimant could collect the statutory benefit. Since this case was in the MDL, the court recognized as follows: "Finally, it would be an especially absurd and unfair result where, as here, the instant claims were effectively held in abeyance for decades because of a judicial backlog of asbestos cases."

Read the full decision here.

Other Summary Judgment Decisions:

- **Bare Metal**
  - **Bare Metal Defense Rebuts Plaintiffs' Causation Argument for Majority of Industrial Equipment Manufacturers**
    (U.S. District Court for the Western District of Wisconsin, April 12, 2017)
  - **Summary Judgment Recommended for Turbine and Valve Defendants in Mesothelioma Case**
    (U.S. District Court for the District of Delaware, March 30, 2017)
  - **Summary Judgment Granted as to Two Defendants and Denied for Several Others in Bare Metal Defense Case**
    (U.S. District Court for the Eastern District of Louisiana, March 6, 2017)
  - **Madison County Jury Renders Defense Verdict for Brake Grinder Manufacturer**
    (Madison County, Illinois, Third Judicial Circuit, February 28, 2017)
  - **Valve Manufacturer's Summary Judgment Denied in Failure to Warn Case Despite Bare Metal Defense**
    (U.S. District Court for the District of South Carolina, Charleston Division, February 13, 2017)
- **Expert Challenges**
  - **Friction Defendants Granted Summary Judgment on the Issue of Causation**
    (Supreme Court of New York, Nassau County, August 2, 2017)
  - **Exclusion of Plaintiffs' Causation Experts Leads to Granting of Summary Judgment**
    (U.S. District Court, District of Maryland, July 17, 2017)
- **Maritime**
  - **Pain and Suffering Damages Found as Pecuniary Under Maritime Law; Summary Judgment Granted in Part and Denied in Part**
    (U.S. District Court for the Eastern District of Louisiana, March 6, 2017)
  - **Magistrate Judge Recommends Granting Summary Judgment to Four Defendants Due to Lack of Evidence**
    (U.S. District Court for the District of Delaware, February 15, 2017)
  - **No Error in Recommendation of Summary Judgment Where Plaintiffs Failed to Establish Causation**

(U.S. District Court for the District of Delaware, January 9, 2017)

- ## Remand/Removal

  - **Plaintiff's Failure to Establish Causation and Lack of Opposition Leads to Grant of Summary Judgment**
    (U.S. District Court for the Western District of Kentucky, October 27, 2017)

- ## Statute of Limitations

  - **Brake Manufacturer's Motion for Summary Judgment Granted Based on Statute of Limitations**
    (Superior Court of Delaware, August 29, 2017)

- ## Statute of Repose

  - **Maryland Court Affirms Application of Statute of Repose in Asbestos Matter**
    (Court of Special Appeals of Maryland, May 31, 2017)

  - **Dissolved Company Failed to Meet Notice Requirements of Statute of Repose**
    (Superior Court of Rhode Island, March 13, 2017)
  - **Rhode Island Court Applies Maine Law to Deny Summary Judgment to Insulation Contractor**
    (Superior Court of Rhode Island, March 13, 2017)

Verdict Reduction Decisions

NYCAL Court Sets Aside Portion of $22M Verdict and Recklessness Charge

(Supreme Court of New York, New York County, February 14, 2017)

As noted in a prior ACT post, a NYCAL jury awarded plaintiff Frank Gondar $22M ($12M for past pain and suffering and $10M for future pain and suffering) in a living mesothelioma claim. Here, the jury found defendant Burnham failed to provide adequate warnings, which was a substantial contributing factor to Mr. Gondar's disease, and allocated Burnham with 25 percent liability. Most notably, the jury found Burnham to have acted with reckless disregard for the plaintiff's safety after the court charged the jury on this issue using the New York Pattern Jury Instructions [PJI 2:275:2]. In New York, under *CPLR 1601[1] and 1602[7],* a defendant is jointly and severally liable for 100 percent of the damages if the jury finds defendant "acted with reckless disregard for the safety of others."

On December 7, 2016, the court heard defendant Burnham's post-verdict motion seeking, among other branches of relief, an order vacating the verdict on various grounds and a new trial and/or remittitur. After both parties put forth a number of arguments, Justice Martin Shulman issued the following rulings:

- There was sufficient evidence to uphold the jury determination that Burnham was 25 percent liable for Mr. Gondar's injuries.
- Gondar's pain and suffering over the duration of 17 months is comparable to that in the *Sweberg* record. To stay consistent with that remittitur ruling, the court felt there was a basis to **reduce the past pain and suffering award from $12M to $5M**.
- Under the circumstances of this case and getting guidance from other NYCAL cases, **the court reduced the future pain and suffering award from $10M to $2M**.
- Finally, the court found there was error in giving the recklessness charge from the New York Pattern Jury Instructions. The court was left to consider two options: (a) follow the recent holding in *Holdsworth* and order a retrial on a framed issue or (b) simply vacate the reckless finding and uphold the jury's verdict subject to the remitter set forth in the record. Justice Shulman then allowed each party to submit a letter determining the scope of his options.

After reviewing the letters submitted by the respective parties, the court issued a written decision on February 10, 2017. Justice Shulman found that based on a Fourth Department decision issued two weeks after this *verdict (Matter of Eighth Jud. Dist. Asbestos Litig., 141 A.D.3d 1127, 35 N.Y.S.3d 615, 2016 N.Y. App. Div. LEXIS 5315, 2016 NY Slip Op 05460 (N.Y. App. Div. 4th Dep't 2016)),* and in the absence of any controlling precedent to the contrary, the court must grant Burnham's post-verdict motion to set aside that portion of the jury verdict which found Burnham had acted with reckless disregard for the plaintiff's safety. Because the court used the charge set forth in the Pattern Jury Instructions, and that charge does not accurately reflect the standard set by the Court of Appeals in *Maltese,* it in effect reduced the plaintiff's burden of proof on his claim that Burnham acted with reckless disregard for his safety.

Accordingly, the court's written decision ordered that:

The branch of Burnham's post-verdict motion for remittitur was granted setting aside the jury verdict on discrete damage awards for past and future pain and suffering and granting a new trial on the issue of damages unless, within ten days after service of a copy of this decision and order with notice of entry, the plaintiff's administratrix executes a stipulation agreeing to decrease the jury's aggregate award for pain and suffering from $22 million to $7 million; and the branch of Burnham's post-verdict motion is granted setting aside the jury verdict's finding of recklessness and granting Burnham a new trial on the issue of Burnham's alleged recklessness, unless the plaintiff's administratrix executes a stipulation agreeing to withdraw or discontinue the recklessness claim.

Read the full decision here.

Appellate Court Reverses Trial Court's Directed Verdict in NYCAL

(Supreme Court of New York, Appellate Division, First Department, January 10, 2017)

On August 29, 2014, Judge Barbara Jaffe entered an order granting defendant Consolidated Edison's (Con Edison) post-trial motion to set aside a verdict against it and direct that judgment be entered in its favor. Upon appeal, the Supreme Court of New York, Appellate Division, First Department, issued an a decision on January 10, 2017. The

crux of this case revolves around the plaintiff's exposure to asbestos while working for a subcontractor at Con Edison's power plant.

The Appellate Division found the trial court improperly set aside the verdict in the plaintiff's favor on the Labor Law § 200 claim against Con Edison. Here, the court held the evidence at trial demonstrated that Con Edison had the authority to control the activity bringing about the injury, and an implicit precondition to this duty is that the party to be charged with that obligation have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition. [Citation Omitted].

The court looked to another recently decided case in Matter of New York City Asbestos Litig. (North) (142 AD3d 408, 409 [1st Dept. 2016], where a jury verdict was upheld in the plaintiff's favor on a Labor Law § 200 claim in an asbestos case where a predecessor of one of the defendants had issued detailed specifications directing contractors in the means and methods of mixing and applying asbestos-containing concrete and insulation at a power plant. In so holding, the court reasoned that it was of no consequence that the defendant had supervised the superintendents, rather than directly supervising the workers. The Appellate Division further compared that Con Edison had the ability to prevent the hazard ultimately causing the plaintiff's injury, namely, the application of asbestos-containing materials. Similarly, Con Edison's specifications affirmatively required the use of hazardous asbestos-containing insulation materials, and Con Edison monitored work for compliance with those specifications. This is a far different situation from one in which a defendant has general workplace oversight and where there is no claim that the specifications themselves mandated that the contractor engage in the injury-producing activity.

In reaching this decision, this court held the order should be reversed to direct a new trial on damages unless the plaintiff stipulates to reduce the loss of consortium verdict to $360,000, the amount suggested by the trial court.

Read the full decision here.

Other Verdict Reduction Decisions:

- **Damages**
  - **Mesothelioma Verdict Reduced by $4.3 Million on Appeal**
    (Supreme Court, State of New York, November 8, 2017)
  - **Compressor Manufacturer's Appeal Denied Based on Finding of Substantial Contribution to Decedent's Disease**
    (Court of Appeal of Louisiana, Third Circuit, August 2, 2017)
  - **Louisiana Court of Appeal Finds $500K Jury Verdict Not Enough**
    (Court of Appeal of Louisiana, Fourth Circuit, May 24, 2017)
  - **California Appellate Court Reverses $3.6M Punitive Damages Award**
    (Court of Appeal of California, Second Appellate District, Division One, February 15, 2017)

Asbestos Litigation Analysis Posts

A Look Back at the Bare Metal Defense in 2017

In the past year, the bare metal defense continued to see some variance from jurisdiction to jurisdiction, with at least one federal appellate court taking up an issue for further clarification late in the year. The bare metal or component parts defense essentially provides that a manufacturer is not liable for harm caused by asbestos products that the manufacturer did not manufacture or distribute, and owes no duty to warn of the hazards inherent to those products. It is viewed in some jurisdictions in the context of causation, with manufacturers of products that did not originally include asbestos component parts escaping liability given a lack of proximate cause for plaintiffs' injuries. Other courts try to examine whether the risks of asbestos hazards were reasonably foreseeable to defendants whose products may ultimately have been integrated with asbestos components when in use in industry. Courts have distinguished bare metal standards in negligence and failure to warn claims. Looking at the published decisions from this year provides some elucidation for parties litigating this issue, but even finer points should emerge with pending decisions.

In reported cases from early in 2017, federal courts hearing summary judgment motions considered the bare metal defense where maritime law applied, specifically in cases involving exposure in the United States Navy. The district courts continued to acknowledge differences in court interpretation of the *Lindstrom* decision, which some courts read to hold that a manufacturer is never liable unless they made, sold, or controlled the aftermarket asbestos components that injured the plaintiff, and which others read as inapplicable to failure-to-warn claims, as influenced by the *Quirin* case. Regardless, the district courts were showing some consistency in analyzing case facts closely under either framework.

With the Third Circuit Court of Appeals Decision in *In re: Asbestos Products Liability Litigation (No. VI)* in early October, the standard was bolstered in negligence claims, with a clear statement that bare metal manufacturers may be held liable for subsequently added asbestos component parts if the injuries were a reasonably foreseeable consequence of the original manufacturer's failure to provide a reasonable and adequate warning on a fact based standard. A few weeks later, the Third Circuit doubled down and certified questions of law to determine whether the bare metal manufacturer has a *duty to warn* about the asbestos-related hazards of component parts that it neither manufactures nor supplies. When the court's ruling on this point of law arrives, expectations are that this one-two punch, and thorough analysis of the bare metal defense will be influential to other courts grappling with existing distinctions of law. We will continue to monitor and report.

Application of § 5 of Federal Employers Liability Act (FELA) for Releases Remains Clear as Mud

Two plaintiffs in two jurisdictions bargain for settlement in asbestos related claims. Both agree to take money in exchange for a release of all future claims. Both later develop new diseases and sue the same defendant again. Only this time, one court finds the release unenforceable and the other court dismisses the complaint. No doubt the split that exists in federal circuits applying § 5 of FELA is confusing and remains fact intensive. The two predominant rules are found in *Babbitt v. Norfolk & Western Railroad Company*, 104 F. 3d 89 (1997) and *Wicker v. Conrail*, 142 F. 3d 690 (1998). *Babbitt* is known as the strict scrutiny test and *Wicker* tends to be more lenient. Recently, two federal courts analyzed the application of § 5 of FELA and issued opinions on opposite ends of the spectrum in cases with somewhat similar fact patterns.

In *South v. Chevron Corporation*, 2017 N.Y. Slip Op 06343, 153 A.D. 3d 461 (2017), a federal court recently affirmed the trial court's denial of summary judgment involving a prior release pursuant to § 5 of FELA. Plaintiff South released a defendant from a 1997 asbestosis suit and agreed to release the defendant from "all bodily and/or personal injuries, sickness or death" from asbestos exposure including "the long term effects of exposure." The defendant paid the plaintiff for the release. Years later, the plaintiff developed mesothelioma and filed suit again against the same defendant. The defendant moved for summary judgment and the plaintiff responded with the position that § 5 of FELA prohibited the settlement from applying to his newly added claim for mesothelioma. The release signed by the plaintiff stated that "he knew that he would be giving up the right to bring an action in the future for any new or different diagnosis that may be made as a result of his exposure to asbestos or other product." The court concluded that under *Babbitt* the application of the release would be barred because defendant had not proved its burden because the release did not "explicitly mention" mesothelioma was being given up as a claim by the plaintiff. Under the less stringent *Wicker* standard, the court also refused to enforce the settlement because the plaintiff's intent to release the subsequent mesothelioma claim was not clear. The court made this conclusion based on general allegations of the complaint which were unclear as to whether the plaintiff had actually developed any disease. The court also noted the

relatively low sum of $1,750.00 paid to the plaintiff. Was this a tacit disapproval of the amount? Traditionally, courts do not play referee over the adequacy of consideration barring unconscionability. Also, the court noted that since the plaintiff did not have a diagnosis of mesothelioma in 1997, the settlement "did not reflect the actual circumstances known to him" despite the settlement having used language to encompass a broad spectrum. The decision suggests that a defendant cannot utilize "all-encompassing" language to safeguard against future claims as the court may find the language as unenforceable boilerplate. Moreover, it may encourage plaintiffs to file again in instances for the same exposures where they've already recovered. A strong dissent followed by Judge J.P. Tom hammered the concept that stipulations are favored by the court and act as a complete bar of action which is the subject of the settlement. Relying on *Wicker*, Judge Tom noted that evidence of the plaintiff's intent to release the defendant was clear and illustrated his understanding of future injuries. Moreover, the dissent stated that the time for a clear standard to judge a release is here.

Two days later another court, in similar factual circumstances, issued an opinion rendering the opposite effect from *South.* In *Cole v. Norfolk Southern Railway Company*, Record No. 161163 the plaintiff developed lung cancer as a result of his work as a machinist for *Norfolk Southern Railroad Company (NSRC)*. Like in *South,* plaintiff Cole had signed a release stating he "does hereby release and forever discharge NSRC from all liability for all claims or actions for pulmonary respiratory occupational diseases and/or other known injuries, physical, mental or financial, suffered or incurred, including but not limited to a) medical, hospital and funeral expenses, b) pain and suffering, c) loss of income, d) increased risk of cancer, e) fear of cancer, f) any and all forms of cancer, including mesothelioma g) and all costs, expenses and damages whatsoever, including all claims, debts, demands, actions, or causes of action of any kind, in law or equity, which the plaintiff has or may have at common law or by statute or by virtue of any action under FELA." The trial court found the release to be enforceable as the plaintiff had "contemplated his injuries including the risk of cancer. On appeal, the Supreme Court of Virginia discussed *Babbitt* and *Wicker*, and chose to adopt the "Risk of Harm case" in which a settlement is not barred by § 5 of FELA provided that 1) there is consideration 2) the release is limited to *those risks which are kno*wn at the time of settlement. The crucial part of the risk of harm test is the intent of the employee upon release. The language of the release is fair game to determine intent according to the court. However, an employee may attack the intent analysis where boilerplate plate language is prevalent. For Cole, the court found that the trial court's finding of intent on the part of the plaintiff to release risks known including future injury was found in the language of the release itself. Here, Cole released "all future cancer claims" for the sum of $20,000. There were no evidentiary findings of the trial court with respect to the plaintiff's challenge on the boilerplate language. Accordingly, the Supreme Court of Virginia affirmed the trial court's enforcement of the release.

How is it that the court in the *South* case rendered the opposite when he too released all actions ***which may accrue in the future*** and where he received consideration? Obviously, the court was applying the strict standard. But how do parties safely negotiate a release with application of two different standards? At the moment the answer appears to rest with the particular jurisdiction. Until a clear standard is set, as pointed out by the dissent in *South*, defendants may be left with a level of uncertainty in certain jurisdictions.

Madison County "Judicial Hellhole" Designation Sees Signs of Changing

Madison County, Illinois has traditionally been dubbed the "judicial hellhole" of asbestos litigation, but this designation shows signs of changing. In the first half of 2016, this venue had 29 percent of the nation's asbestos filings. It has a history of unfair docketing practices, denial of forum non conveniens motions, and large plaintiff verdicts. Full-blown jury trials in asbestos litigation are rare for various reasons, not the least of which is the threat of multi-million dollar plaintiff verdicts, but in recent years Madison County jury verdicts have favored a wide variety of defendants over plaintiffs. Defense verdicts have ranged from premises and joint compound defendants to naval suppliers and automotive brake grinders. This significant trend may serve to quell the fears of defendants being served with complaints in this jurisdiction, and may provide a more balanced judicial forum.

One of the first jury verdicts indicating a trend in favor of defendants was in the case of *Harry Glass, special administrator of the estate of Mary Glass, deceased v. NL Industries,* No. 06-L-278. Plaintiff Harry Glass alleged secondary exposure to his wife Mary after she died of mesothelioma, from his work at National Lead in Granite City, Illinois. The jury returned a defense verdict for NL Industries in less than two hours.

In November 2013 the jury returned a defense verdict, this time in a living mesothelioma case, *James Reef v. Georgia Pacific LLC*, No. 12-L-2069. Despite the plaintiff's claim of spending 50 percent of his time working on drywall with Georgia Pacific joint compound during his career as a carpenter, the jury returned a defense verdict for Georgia Pacific after only three hours of deliberation. Both the amount and type of asbestos the plaintiff was exposed to were the deciding factors. Although there was no argument that the plaintiff used Georgia Pacific's products, the question was how much. At the end of the day, the jury did not believe that the amount and type of asbestos associated with Georgia Pacific products was strong enough to result in mesothelioma.

The defense trend continued shortly thereafter with a verdict in favor of Crane Co. in February 2014. In *Brian King, special administrator of the estate of Tom King, deceased v. Crane Co*., No. 13-L-31, the decedent was a U.S. Navy machinist's mate from 1959-62, and from 1965-69. He repaired pumps, valves, gaskets, and insulation aboard WWII era destroyers. The plaintiffs alleged that exposure to asbestos-containing gasket material contributed to decedent's mesothelioma. The jurors found that the plaintiffs failed to prove that Crane's asbestos-containing gasket material, Cranite, was aboard the naval ships, and there was not enough evidence to show that Crane knew that it should have had warnings on its products.

Most recently, in February 2017 the jury rendered a verdict in favor of defendant Hennessy Industries, Inc. In *Stan and Janet Urban v. Hennessy Industries, Inc*., No. 13-L-437, Stan Urban alleged exposure using brake grinders while employed as a high school auto technology teacher in Michigan. He was diagnosed with mesothelioma in January 2013. Defense counsel highlighted the fact that the plaintiff's asbestos exposure from using Hennessy's brake grinder amounted to 12 days out of a 30 year career with brake grinders. The grinders were built and sold without any asbestos, and the plaintiff's deposition and trial testimonies contained inconsistencies.

Madison County is traditionally a tough jurisdiction for defendants. Its blue collar, conservative mentality is difficult to overcome with legal defenses, and prior judges were not exactly open to defense arguments. If more defendants push cases to trial and are successful, like the defendants outlined above, there would be a reduction in the cases filed in this venue. This would entail defendants taking a risk on a jury determination. Until such risks are more frequently taken and rewarded with defense verdicts, plaintiffs will continue to flood Madison County with numerous actions. Time will tell if more defendants are willing to try a case in this venue and we will continue to report any developments as they occur.

Personal Jurisdiction Decision by Missouri Supreme Court to Significantly Impact Asbestos Litigation in Missouri

St. Louis City, Missouri is often termed a "judicial hellhole" for corporate defendants in product liability actions, most notably in asbestos litigation. Until recently, Missouri courts offered little guidance on what constituted general jurisdiction for corporate defendants in light of the U.S. Supreme Court's holding in *Daimler AG v. Bauman*, 134 S.Ct. 746 (2014). In *Daimler,* the Supreme Court held that absent exceptional circumstances, a company is only subject to general jurisdiction in its state of formation or where it has its principal place of business, i.e., where it is "at home. On February 28, 2017, the Missouri Supreme Court issued an opinion clarifying Missouri's position on general personal jurisdiction over foreign corporations in light of *Daimler.*

State ex rel. Norfolk Southern Railway Company v. Dolan involved a personal injury claim brought under the Federal Employer's Liability Act. Filed in St. Louis County, the plaintiff was an Indiana resident claiming cumulative trauma injury sustained during his years of employment with Norfolk in Indiana. The plaintiff never worked for Norfolk in Missouri. Other than the statement in the petition that Norfolk conducts substantial business and owns property in Missouri, the plaintiff did not allege any basis for specific or general personal jurisdiction. Defendant Norfolk Southern Railway Company was a Virginia corporation with its principal place of business in Virginia. Norfolk contacts with Missouri included:

- Annual registration with Missouri and designation of an agent to receive service of process. The court noted this was in compliance with Missouri's foreign business registration statute.
- Norfolk had brought suit and been sued in Missouri courts numerous times, but only for matters arising from or related to its activities in Missouri.

In its opinion, the Missouri Supreme Court summarized the general principles governing personal jurisdiction. Citing *Daimler* AG v. Bauman, 134 S. Ct. 746 (2014), personal jurisdiction was a due process requirement that limited the power of state courts over litigants. It could be general (all-purpose), specific (conduct-linked), or consensual (waived by defendant).

First, the majority of the court's opinion discussed general jurisdiction and the lack thereof. General jurisdiction exists in suits not arising out of related to the defendant's contacts with the forum. In recent years, the U.S. Supreme Court in *Daimler* clarified the test for when the exercise of general jurisdiction over a corporation comports with due process. A court normally can exercise general jurisdiction over a corporation only when the corporation's place of incorporation or its principal place of business is in the forum state. General jurisdiction may exist in an additional state if the corporation's activities in that other state are so substantial and of such a nature as to render it at home in that state.

The plaintiff argued that Norfolk's continuous and systematic activity in Missouri through its miles of railroad track conferred general jurisdiction. The court noted that before *Daimler*, these would have supported finding general jurisdiction. However, "it is no longer the law." The defendant in *Daimler* conducted substantial and continuous business in California selling luxury cars; however, it did so throughout the United States, and California business constituted only 2.4 percent of its total sales. The Supreme Court held this was not sufficient to subject the corporation to general jurisdiction in the state for all causes of action not related to that state. Like the defendant in *Daimler*, Norfolk's activities in Missouri amounted to 2 percent of its nationwide business; these contacts were insufficient to establish general jurisdiction.

The court likewise rejected the plaintiff's argument that this was an "exceptional case" anticipated by the Supreme Court in *Daimler*. To be such an "exceptional case," the forum state must be a surrogate for place of incorporation or home office such that it is essentially at home in that state. Finding a corporation "essentially at home" required comparing its activities in the forum state with its activities nationwide and worldwide. Finding a corporation at home wherever it does business destroyed the distinction between general and specific jurisdiction.

Second, the court found that specific jurisdiction did not exist because the plaintiff's claims were not related to Norfolk's activity in Missouri. The plaintiff never worked for Norfolk in Missouri. The plaintiff argued that Norfolk engaged in railroad business in Missouri, and since his injuries arose out of railroad business conducted by Norfolk in Indiana, these injuries arose from the same type of activities as Norfolk's Missouri activities. However none of the cases cited by the plaintiff supported the proposition that, if a company was a national company that did the same type of business in the forum state as in the rest of the country, it could be sued anywhere.

Third, Norfolk's compliance with Missouri's foreign corporation registration statutes did not create consent to jurisdiction. The plain language of Missouri's registration statutes did not mention consent to personal jurisdiction for unrelated claims, nor do they provide an independent basis for jurisdiction over foreign corporations that register in Missouri. Finding that registration created consent to jurisdiction would allow national corporations to be sued in every state, rendering *Daimler* pointless.

This ruling by the Missouri Supreme Court should hopefully put the jurisdiction issue against foreign corporate defendants to rest and help curb the blatant forum shopping performed by the plaintiff's bar. Limiting general jurisdiction to forums in which corporate defendants are "at home" will greatly limit the number of corporate defendants being sued in Missouri for asbestos claims. This may result in increased litigation in other forums, such as Madison County, Illinois, another "judicial hellhole" for corporate defendants. Now that St. Louis City is limited, only time will tell which jurisdiction will pick up new asbestos claims.