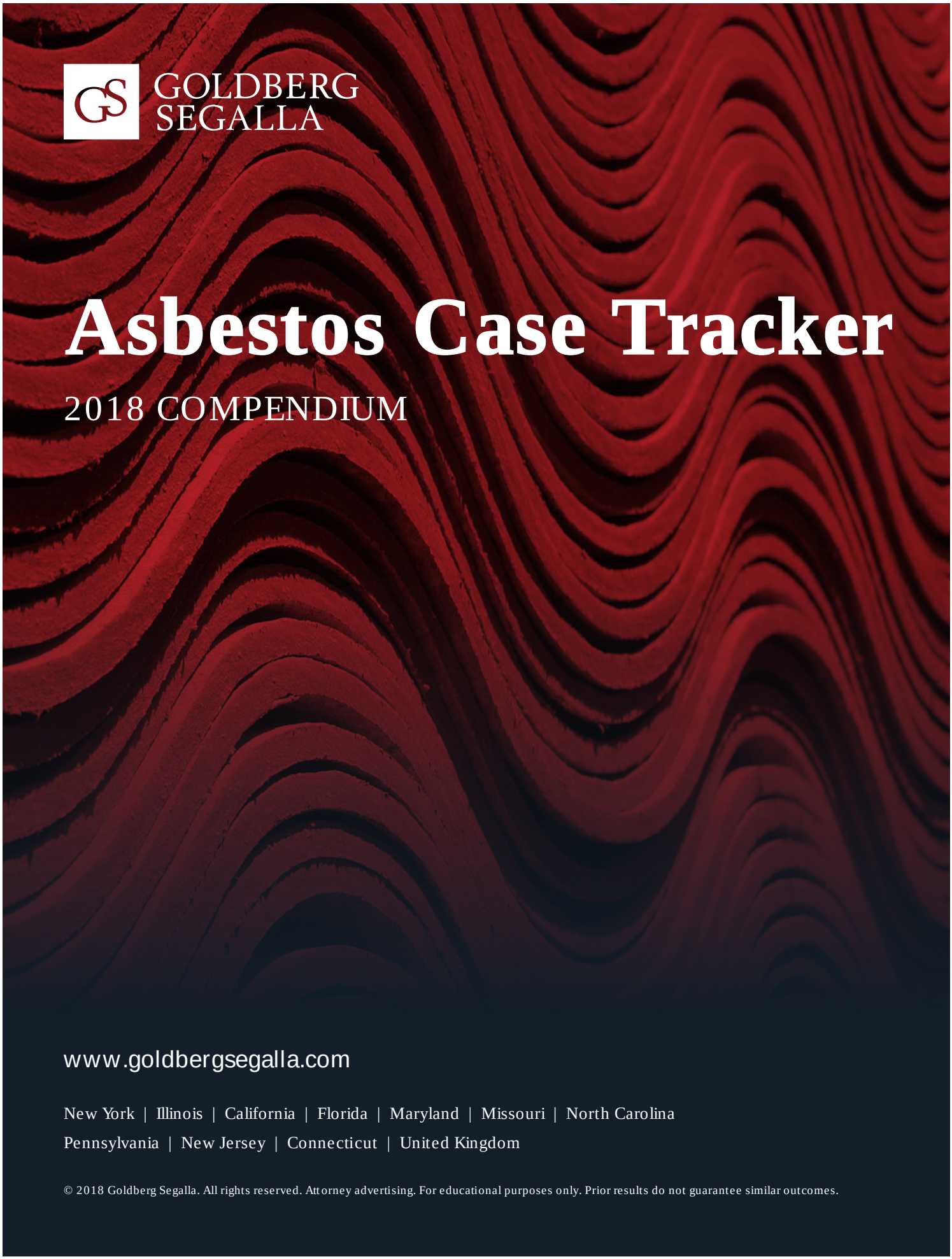

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Bankruptcy Decisions

Limited Access to Exhibits Filed in Asbestos-Related Bankruptcy Cases was proper under Bankruptcy Code Section 107

(U.S. District Court for the District of Delaware, March 27, 2018)

Appellants Honeywell and Ford filed a request seeking unlimited access to thousands of exhibits (2019 Exhibits) filed in nine Delaware bankruptcy cases commenced in connection with the debtors' asbestos-related liabilities (Consolidated Cases). All but one of the nine Consolidated Cases was closed. The appellants argued they were entitled to indefinite access to the 2019 Exhibits, including investigating potential fraud in the claims process and advancing the appellants' legislative and lobbying activities. The appellees (various Trust Advisory Committees and Future Claimants Representatives) opposed the request, arguing that these purposes were improper. The Bankruptcy Court allowed limited access to investigate potential fraud, and Appellants appealed.

At the time of the bankruptcy filings in the 2000s, Bankruptcy Rule 2019 required certain personal identifying information about creditors and equity holders represented by the entity preparing the statement. In 2004, the bankruptcy judge entered orders standardizing these disclosures to eliminate substantive personal information, so that the 2019 Statements could be electronically filed and publicly available. These orders did not seal the 2019 Exhibits but regulated access in light of privacy concerns. These procedures have been reviewed and approved by several courts. Litigation regarding access to these exhibits continued.

The court started its analysis by noting the common law presumption of public access to judicial records and which is codified in Bankruptcy Code Section 107. In 2005 Congress enacted the Bankruptcy Abuse Prevention and Consumer Protection Act, and included privacy protections. The court then found that Appellants could not appeal the 2019 Orders enacted in 2004 and 2005; much prior litigation established that the Bankruptcy Court had authority to enact these orders. Further, Section 107(a), which governs public right to access, applied to papers that were "filed in a case" OR that were on "the dockets of a bankruptcy court," and applied in this case.

Finding Section 107(a) applied, the court next addressed whether exceptions to public access to these documents, as outlined in Section 107 (b) and (c), applied to the 2019 Exhibits. It found that 107(c) applied, in that "a bankruptcy court may protect an individual with respect to [certain] types of information to the extent the court finds that disclosure… would create undue risk of identity theft or other unlawful injury to the individual or the individual's property.'" It was undisputed that some protectable information was present in the 2019 Exhibits. The Bankruptcy Court's conclusion limiting access was not clearly erroneous.

The court also found that the Bankruptcy Court properly considered Appellants' purpose in requesting access to the 2019 Exhibits, as this was authorized by Section 107(c). The Bankruptcy Court found no precedent for unlimited access to 2019 materials for uses outside of judicial proceedings, such as lobbying, which appellants conceded was one of their purposes in seeking access. Here, the only proper purpose identified by the appellants was using the 2019 Exhibits to ferret out fraud in administration of the NARCO Trust. Restrictions imposed by the Bankruptcy Court were proper.

Read the full decision here.

Bare Metal/ Component Parts Decisions

Summary of Supreme Court Oral Argument on the Bare Metal Defense

(U.S. Supreme Court, October 10, 2018)

On October 10, 2018, oral argument was conducted in Air and Liquid Systems Corp. v. DeVries, a case involving application of the bare metal defense in asbestos cases under maritime law, as previously reported. Petitioners were represented by Shay Dvoretzky of Jones Day and argued first. His first comment was that under long-standing tort law, manufacturers should not be liable for harm caused by third-party goods. Justice Ginsburg then immediately questioned whether the products at issue were of any use without the addition of asbestos. Dvoretzky responded that the same products are currently used by the Navy without asbestos. Justice Ginsburg replied by stating that the manufacturers knew that asbestos would be used, which is the central issue in this appeal. Dvoretzky countered by repeating his original statement that the products which caused the injury were manufactured by third parties, which should therefore bear the responsibility. Justice Sotomayor then challenged counsel's argument by stating that the asbestos was safe until heat from the petitioners' products caused it to degrade, making the petitioners' products themselves the cause of the injury.

From there, counsel was questioned whether petitioners were seeking application of a special rule under admiralty law, or tort law generally. Dvoretzky commented that the lack of liability for a third-party's products is a general tort principle which should be applied to admiralty law. He was challenged again by Justice Sotomayor on this point, noting that the principle is not uniformly adopted by the states. Dvoretzky responded that there is a split in asbestos cases, but argued that respondents have failed to demonstrate a single case outside of asbestos litigation where a product manufacturer is liable for injuries caused by a third-party's product. He urged the court to adopt that broader view.

Next, counsel was asked to explain how that principle should be adopted when manufacturers required the use of asbestos, which is a hazardous product. Justice Kagan joined in, asking counsel to explain how his argument was fair, that a company could be not liable even though it directed the use of asbestos. Dvoretzky responded by stating that the burden should be placed on the parties that have the ability to control the harm, ***i.e.*** the insulation manufacturers.

Counsel for Respondents, Thomas Goldstein, then began his argument by stating that this is a failure to warn case under Section 388 of the Second Restatement, and that if company makes a product with a part that it knows is harmful, then it needs to provide a warning. Goldstein latched onto the argument that asbestos by itself is not harmful, but that when it is used on machines it degrades and requires replacement, creating harmful asbestos dust. Next, Goldstein mentioned the special solicitude of sailors, which sets apart this issue from one under ordinary common law, as the Third Circuit held. Next, Goldstein described how a warning could have been placed in the product manual, because that is where the person performing the repairs will see it. He argued that this is because any warning placed on actual asbestos material will have degraded over time.

In response to a question from Justice Gorsuch about the standard respondents wished to be applied, Goldstein argued adoption of the Third Circuit's ruling that manufacturers' should be responsible for the reasonably foreseeable harm that comes from their products. Of note, he stated that the Third Circuit "did not say that you are responsible for replacement parts that are reasonably foreseeable to be used with your machine." Goldstein then worked through a host of hypotheticals posed by the court, in addition to some he offered, to demonstrate his arguments. At one point, Justice Roberts stated that one of the hypotheticals that counsel posed seemed to align with the petitioners' position. While the Justices posed more questions during the petitioners' argument, it remains to be seen which way the court will rule. We will post an update here once a decision is reached by the court.

Read the full case decision here.

U.S. Supreme Court Set to Hear Bare Metal Defense Argument

(U.S. Supreme Court E.D Pennsylvania, October 9, 2018)

On October 10, 2018, the United States Supreme Court will hear argument in Air and Liquid Systems Corp. v. DeVries, a case involving the bare metal defense under maritime law. The case was originally filed in the Philadelphia Court of Common Pleas in December 2012. It was then removed to the Eastern District of Pennsylvania based upon the federal officer removal statute, due to the decedent's work on Navy ships. Several defendants' motions for summary judgment were granted on plaintiff's negligence claims, based upon the bare metal defense. The decision was appealed to the Third Circuit, which reversed the District Court's ruling in October 2017. That decision was previously addressed by this blog. The defendants petitioned the Supreme Court to take up the appeal, and the petition was granted in May 2018. The case has been fully briefed and will be argued on October 10, 2018.

New Jersey Appellate Court Undermines Bare Metal Defense

(Superior Court of New Jersey, Appellate Division, August 6, 2018)

The plaintiff, Arthur Whelan, worked as a plumber and auto mechanic and later developed mesothelioma. He filed suit against numerous manufacturers of boilers, valves, steam traps and brake drums. While the plaintiff did install original products, the bulk of his testimony concerned replacement components used with the products. Many defendants filed motions for summary judgment, arguing that plaintiff had failed to demonstrate evidence of exposure to a product they sold, manufactured or supplied. The trial court found the defendants were not liable for asbestos-containing replacement parts that they did not manufacture or place into the stream of commerce, and granted summary judgment as to each.

On appeal, the New Jersey Appellate Division reversed. This decision was based on the finding that a manufacturer's product includes any replacement parts necessary to its function; therefore, defendants' duty to warn extends to any danger created by those replacement parts. The court found that it was undisputed that the defendants' products as originally marketed had asbestos-containing parts. Furthermore, no defendants argued that they were unaware that the component parts would be replaced regularly. The court additionally held that the replacement of an original part with a substantially similar part is a foreseeable alteration. Accordingly, the replacement of the asbestos did not alter either the injury-producing element or the product defect. The court concluded by stating that a manufacturer will have a duty to warn in strict liability if a plaintiff can show: 1) the manufacturer's product as marketed to the end user contained asbestos-containing components; 2) the asbestos-containing components were integral to the function of the product; and 3) the manufacturer was reasonably aware its product would require periodic and routine maintenance involving the replacement of the asbestos-containing component parts with other asbestos-containing component parts.

Read the full case summary here.

Supreme Court Accepts Review of Bare-Metal Defense under Maritime Law

(U.S. Supreme Court, May 14, 2018)

On May 14, 2018, the U.S. Supreme Court accepted the petition of Air & Liquid Systems, CBS Corporation and Foster Wheeler to resolve a split among circuits regarding the viability of the bare metal defense under maritime law. Specifically, the parties appealed the Third Circuit's ruling in October 2017 that the bare metal defense is inapplicable to negligence claims under maritime law. That opinion was previously analyzed by this blog post. The Supreme Court will resolve a split on the issue between the Third and Sixth Circuits. The exact issued to be reviewed by the Supreme Court is "Can products-liability defendants be held liable under maritime law for injuries caused by products that they did not make, sell, or distribute?"

Motion for Reconsideration Based Upon Change in Law Denied as Untimely

(U.S. District Court for the District of Delaware, April 9, 2018)

Plaintiffs Icom and Johanna Evans filed a lawsuit on June 11, 2015 in Delaware Superior Court relating to Mr. Evans' alleged asbestos exposure. Foster Wheeler removed the matter to federal court on August 4, 2015, pursuant to the federal officer removal statute. Defendants Foster Wheeler and Warren Pumps filed motions for summary judgment in October 2016. Both motions were opposed. The district court issued a Report and Recommendation (R&R) on August 30, 2017, recommending that the motions be granted pursuant to maritime law, based upon the lack of substantial factor causation and the bare metal defense. The plaintiffs did not oppose the R&R, and Judge Robreno adopted the court's recommendation and granted the motions on September 26, 2017.

In a separate case, on October 3, 2017, the Third Circuit Court of Appeals issued its opinion in the Devries matter, holding that the bare metal defense is not an absolute bar to a plaintiff's negligence claim under maritime law. On November 8, 2017, the plaintiffs filed a motion for reconsideration of the entries of summary judgment based upon the opinion in Devries. The deadline to file a motion for reconsideration, pursuant to F.R.C.P. 59(e) is 28 days, meaning plaintiffs had until October 24, 2017 to file the motion. The court denied the plaintiffs' motion as untimely, particularly since they did not address the lapsed deadline or offer any good cause why it was untimely filed.

Read the full decision here.

Boiler Manufacturer's Summary Judgment Reversed; Question of Fact on Product ID *and Denial of Bare Metal Defense*

(U.S. District Court for the Northern District of California, April 2, 2018)

In this federal court case, the plaintiffs commenced an action in the Eastern District of Pennsylvania alleging the plaintiff's decedent, Robert Hilt, was exposed to asbestos from numerous products, including Foster Wheeler boilers, on Navy ships. Foster Wheeler moved for and was granted summary judgment based on the finding that the plaintiff's expert, Dr. Charles Ay's, opinion was speculative. Subsequently all other defendants either settled or were dismissed from the case. The plaintiff appealed the order granting Foster Wheeler summary judgment and the Ninth Circuit Court reversed. In its decision, the Ninth Circuit found that Dr. Ay's, opinion 'was sufficient to create a genuine issue of material fact as to whether Robert Hilt was exposed to asbestos fibers from insulation supplied by Foster Wheeler." The Ninth Circuit did not address 'whether there was a genuine issue of material fact that Hilt's alleged exposure to asbestos-containing boiler insulation was a 'substantial contributing factor in causing his injuries.'" The case was then remanded to the U.S.District Court, N.D. California for consideration of any remaining grounds for summary judgment in Foster Wheeler's moving papers.

On remand, the District Court denied Foster Wheeler's remaining arguments related to product identification/causation and bare metal defense. In its discussion the court highlighted that maritime law applies and to "establish causation under maritime law, Plaintiffs must show that (1) Hilt was exposed to asbestos-containing material manufactured or supplied by Foster Wheeler, and (2) such exposure was a substantial contributing factor in causing his injury." Foster Wheeler argued that there was "(1) a lack of evidence that Hilt had been exposed to asbestos from a Foster Wheeler product, and (2) a lack of evidence that Foster Wheeler manufactured, sold, or supplied the actual asbestos-containing materials to which Hilt was exposed." However, the court denied the product identification/causation portion of the motion agreeing with the Eastern District of Pennsylvania Court's prior finding that there was evidence that Mr. Hilt was exposed to asbestos from insulation used with Foster Wheeler boilers while aboard Navy ships. The court also denied the bare metal argument stating "Plaintiffs have proffered a declaration from Charles Ay, who concluded that it was 'more likely than not that [Hilt] was exposed to and inhaled respirable asbestos fibers in concentrations orders of magnitude above background or ambient levels from asbestos-containing refractory original to the Foster boilers."

Read the full decision here.

Damages Decisions

Covil Corp. Seeks to Overturn $33 Million Verdict in North Carolina

(U.S. District Court. for the Middle District of North Carolina, November 19, 2018)

In October, the plaintiff, Ann Finch, prevailed against Covil Corp. in a mesothelioma case involving her husband's workplace exposure at Firestone. Covil made asbestos insulation that Mr. Finch worked around daily while changing molds on tire presses. The plaintiffs were awarded $32.7 million by the jury, which found that Covil failed to warn Mr. Finch that there was asbestos present in the insulation and that it posed a hazard to his health.

Covil has filed a motion to overturn the verdict or, in the alternative, for a new trial, arguing that the case was tried like a punitive damages matter even though the plaintiffs' punitive damages claim was dismissed at summary judgment. The company argued that the court improperly admitted character evidence against Covil, prohibited the introduction of rebuttal evidence relevant to its continuing duty to warn, and forced Covil to stipulate to prejudicial and irrelevant portions of a co-worker's testimony.

Special Master's Recommendation Vacated; Order Permitting Limited Discovery of Co-Defendants to Establish Apportionment Granted

(Nov 14, 2018)

The defendant John Crane (JCI) has been granted limited discovery of co-defendants to establish apportionment of fault. JCI's request had been denied by the Special Master. However, JCI argued that the Case Management Order (CMO) placed it in an unfair position for trial. The CMO encouraged defendants to use depositions in asbestos litigation from other defendants and permitted a second deposition by stipulation or permission only. According to JCI, these constraints made it impossible for JCI to meet its burden of proof at trial with respect to apportionment of fault for co-defendants. The court agreed. However, the court noted that full discovery was not warranted and limited the parameters to 1) the products co-defendants manufactured 2) the asbestos content of the products 3) whether or not warnings were placed on the products during the relevant time period and 4) information related to trade associations.

Accordingly, the Special Master's recommendation was vacated.

California Appellate Court Defines Scope of Damages Recoverable in Survival Action

(California Court of Appeal, First District, August 23, 2018)

The First District of the California Court of Appeal addressed numerous issues in a case involving exposure to friction products used during personal automotive repair. The family of decedent, J.D. Williams, filed suit in January 2011 after his July 2010 death from mesothelioma. The plaintiffs asserted claims for wrongful death, strict liability and negligence. The defendant, Pep Boys, was not named in the lawsuit until an amended complaint was filed on December 6, 2012. The trial court granted Pep Boys' motion for judgment on the basis that the statute of limitations had expired, but allowed other claims to proceed during a lengthy bench trial.

On appeal, the court addressed five issues: 1) whether the court abused its discretion in allowing Pep Boys to amend its answer to correct a previously-asserted statute of limitations defense; 2) whether the court erred in granting Pep Boys' motion for judgment on the statute of limitations defense; 3) whether the court erred in failing to award damages for the costs of providing home health services; 4) whether the court erred in applying offsets to the award of economic damages based on prior settlements without allocating between the estate claims and the wrongful death claims; and 5) whether the court erred in awarding expert fees to Pep Boys. The court found merit on the third and fifth grounds. However, only the third was addressed in the published opinion as the other sections were not certified for appeal.

On the third issue, the trial court limited its award to the amount of decedent's lost social security and pension benefits. The estate plaintiffs argued that the trial court erred by refusing to also award damages for the costs they incurred for decedent's home health care and the home health care provided to his wife. The appellate court explained the nature of survival claims and the scope of damages recoverable under the relevant statute, California Civil Code section 377.34. Specifically, an estate can recover the "deceased plaintiff's lost wages, medical expenses, and any other pecuniary losses incurred before death." Based on this law, the appellate court found that the estate plaintiffs were entitled to recover the reasonable value of medical and other services they provided to decedent prior to his death, in addition to the home health care costs they provided to his wife, prior to his death. Plaintiffs were not entitled to recover

damages for the value of services decedent would have provided to his wife, had he survived, because those claims do not represent "loss or damage that the decedent sustained or incurred before death."

Read the full case decision here.

$117 Million Verdict Upheld in Talc Case

(Middlesex County, New Jersey, July 2, 2018)

Superior Court Judge Ana C. Viscomi denied motions from Johnson & Johnson and Imerys Talc America, Inc. to set aside a $37 million verdict in compensatory damages and a combined $80 million verdict in punitive damages awarded earlier this year. On Wednesday, May 23, 2018, the court heard arguments on Imerys Talc America, Inc.'s motions to overturn the verdict. The court instead upheld the verdict. In rendering her decision, Judge Viscomi stated that the verdicts "do not shock the judicial conscience."

Admission into Evidence of Testimony and Answers to Discovery of Settled Defendants Leads to New Trial Ordered on Issue of Apportionment

(Superior Court of New Jersey, Appellate Division, June 29, 2018)

Donna Rowe (plaintiff), individually and as executrix and executrix ad prosequendum of the estate of Ronald Rowe (Rowe), appealed an April 27, 2015 judgment of $304,152.70 plus prejudgment interest. The plaintiffs originally sued 27 defendants, alleging that exposure to asbestos from their products caused Rowe's mesothelioma. Twelve defendants were granted summary judgment, four were dismissed, and two never appeared and the claims against them were abandoned. Additionally, eight parties settled their claims before trial, leaving only Hilco, Inc., the successor-in-interest to Universal Engineering Co., Inc. (Universal) at trial.

Universal cross-claimed for contribution against all co-defendants under the Joint Tortfeasors Contribution Law and the New Jersey Comparative Negligence Act. Prior to trial, Universal sent notices in lieu of subpoena to each of the eight settling the defendants, demanding the appearance of a corporate representative to provide testimony. The notices stated that they "shall remain in effect in the event your client settles or is dismissed from the case." Universal certified that none of the settling the defendants would produce a witness at trial.

During trial, Universal read portions of testimony from corporate representatives from the six of the settling the defendants who are based outside of New Jersey; the other two were not allowed because they are based in New Jersey, and thus, available to appear. Universal further read selected interrogatory answers of all the eight settling the defendants because as the trial court ruled, it was allowed as long as they were certified answers. Some of the interrogatories were filed in the instant matter, others from different Middlesex County matters, and others from matters entirely outside of New Jersey.

At the close of Universal's case, the plaintiffs moved to dismissed Universal's claims against the settling the defendants, contending that no sufficient basis for allocation had been established. The court rejected the plaintiffs' allocation argument, stating that "there were factual proofs that were presented, and it ultimately will be up to the jury to determine whether they are sufficient."

The jury awarded $1.5 million in compensatory damages. The jury allocated the damages as follows: twenty percent to Universal and the remaining eighty percent, in varying increments, against the eight settled the defendants.

The plaintiff appealed, arguing that the trial court erred in allowing the non-settling the defendant, Universal, to introduce answers to interrogatories and testimony of the settling the defendants from prior proceedings because such evidence is hearsay that did not fall within any exception to the rule against hearsay.

The appeals court determined that the trial judge erred in admitting the settling defendants evidence and that it was not exempt from the general prohibition against hearsay. The trial judge further erred by deciding the settling the defendants were unavailable "merely because they declined to appear without having been released either by counsel or the court." The appeals court stated that "allowing the admission of evidence by a defendant against the very party that crafted the evidence and can defend itself is qualitatively different than what Universal did here, which was to transform statements of settling the defendants into unrebuttable admissions to be used against a party that did not make those admissions." The trial court "allowing the admission of this evidence transformed the statements of the settling the defendants into irrefutable admissions to be used against the plaintiff, even though plaintiff did not make the statements."

The appeals court also determined that "the trial court failed to require that Universal demonstrate due diligence in ascertaining the unavailability of the settling the defendants" and in doing so, erred in admitting the corporate representative testimony of the six out-of-state settling the defendants. The party seeking to admit prior testimony has the burden of demonstrating that the witness is unavailable, and Universal did not do so.

The case was reversed and remanded for a new trial on the issue of apportionment.

Post-Trial Motions Denied Against Both Plaintiff and Defendant on Damages and Judgment as a Matter of Law

(U.S. District Court, W.D. Washington, June 4, 2018)

The plaintiff filed suit against the defendants including Scapa Dryer Fabrics (Scapa) alleging her husband, Mr. Barabin, developed mesothelioma as a result of his work at Crown-Zellerbach paper mill in Camas, Washington. Mr. Barabin worked as a spare hand, which included working directly on the paper machines at the mill. Part of his work including using high pressure hoses to blow dust out of the dryers. Suit was brought against the defendants on theories of product liability design, failure to warn, and negligence. Trial was held in 2009 with an award of $700,000 for economic damages and $9,500,000 in non-economic damages. On appeal, the Ninth Circuit remanded the case holding that the District Court erred in determining expert issues under ***Daubert.*** A second trial was held. A verdict of $750,000 for economic damages an $306,000 in non-economic damages was found by the jury. The plaintiff moved for a partial new trial on the issues of non-economic damages. Specifically, the plaintiff claimed that the jury "assessed grossly inadequate non-economic damages" which were a result of improper statements made Scapa during trial. The court disagreed. According to the court, a new trial may be undertaken pursuant to Federal Rule 59(a) when the verdict is "clearly not supported by the evidence." Relying on the ***Holzhauer*** decision, the court was unconvinced that the plaintiff's evidence was anything other than an intangible concept with regard to "enjoyment of life, affection and companionship." Moreover, the court was satisfied that the deliberation process was proper since the plaintiff agreed that the jury instructions were not improper. As for the plaintiff's claims that Scapa's counsel made improper statements to the jury concerning the plaintiff's exposure to asbestos from other entities, the court was unpersuaded. Here, the plaintiff was the first to offer or discuss the status of the other entities by alerting the court that although others were sued, Scapa was the last remaining defendant. And more importantly, statements made by counsel do not constitute as evidence. Therefore, the plaintiff's motion was denied.

The court then turned toward Scapa's motion for judgment as a matter of law. Scapa maintained that the plaintiff failed to present evidence to find negligence, prove causation and that Mr. Barabin was exposed to Scapa's dryer felts. At the outset, the court noted that the standard for a renewed motion for judgment requires the movant to show that the plaintiff "failed to support her claims with substantial evidence." the plaintiff took the position that Scapa had not previously raised the argument as to negligence and should not be permitted to do so now. The court agreed but also noted that the argument failed even if it had been previously raised. Scapa took the position that the jury couldn't have found Scapa negligent since it did not find Scapa liable on the product defect claims. From that premise, Scapa argued that the only negligence finding the jury could have made was on a failure to warn issue with respect to Mr. Barabin's unintended use of the dryer felts. Therefore, Scapa contended that it had no duty to warn under those circumstances. The court rejected that premise as the court's instructions stated that negligence was the "failure to exercise ordinary care" as opposed to just designing a reasonably safe product. Finally, Scapa argued that causation was not proven by the plaintiff. Specifically, Scapa argued that the plaintiff's exposure to its dryer felts was nothing more than theory or speculation. For example, during 1974 and 1975 the evidence showed that 41 out of 83 sheets were provided by Scapa and that the plaintiff's work on the numbers 5 and 6 machines were "occasional" at best. Although the court understood Scapa's position it noted that the jury could have chosen either conclusion on causation. Therefore, Scapa's argument as to causation was denied. Scapa made a last attempt on its motion by arguing that expert testimony from Drs. Compton and Brodkin were inadmissible. The court noted that Scapa's arguments were very similar to its arguments made at the previous ***Daubert*** hearing. And although the court conceded that Dr. Compton's testimony may have not met the rule's standard for "fit" requirement", Scapa failed to show that Dr. Compton's testimony should have been excluded. Consequently, Scapa's motion for judgment was denied.

Read the full decision here.

Expert and Fact Witness Evidence Establishes Last Day of Exposure for UPS Worker in Workers' Compensation Commission Award

(Court of Appeals of North Carolina, May 1, 2018)

The plaintiff filed an action under North Carolina Workers' Compensation for alleged development of mesothelioma by her decedent. Mr. Penager worked as a driver for United Parcel Services (UPS) from approximately 1967-98. It was alleged by the plaintiff that Mr. Penegar drove tractor trailers each day and would walk through the mechanic shop after his shift where workers were using compressed air to clean out dust from brake jobs. The Commission found that the plaintiff's last date of injury from asbestos occurred while working for UPS. The Commission awarded the plaintiff "compensation for all of Decedent's medical expenses associated with the diagnosis of his mesothelioma, total disability compensation, burial expenses and death benefits."

The defendant filed an appeal and took the position that the evidence did not support the finding as to last date of injury. The plaintiff appealed the Deputy Commissioner's finding of his weekly wage.

The court reviewed the evidence and noted that two co-worker mechanics testified as to the use of asbestos containing brakes, dust and a lack of masks during the relevant years. Additionally, several experts testified as to causation and risk. The defendants then took the position that the commission erred by not taking into account the plaintiff's exposures to asbestos from subsequent work. Relying on narrow construction of Worker's Compensation Act cases, the court flatly rejected that argument. Moreover, the ***Rutledge*** case illustrated that there is no requirement for the plaintiff to show how "much each exposure resulted in the disease" according to the court. Finally, the court stated that the burden to show subsequent exposure shifts to the employer in the absence of such evidence.

The plaintiff also took exception with the Deputy Commissioner's calculation of the plaintiff's weekly wage. The court noted the Commission has the authority to revise fact findings made by the Deputy Commission. The plaintiff argued that the ***Reed*** decision limited the scope of the review. However, the court disagreed and stated that ***Reed*** dealt with an issue first raised on appeal and was not applicable to the instant matter. Accordingly, the court affirmed the Commission's award as to the last date of exposure. The court affirmed the Commission's recalculation of weekly wage and dismissed the remaining appeal on maximum commission rate as moot.

Read the full decision here.

Case Remanded to Determine Setoff Amounts from Settlements with Asbestos Trusts

(Supreme Court of Mississippi, February 15, 2018)

On February 13, 2009, Clara Hagan filed a complaint, as the representative of Bennie Oakes, against Illinois Central Railroad in the Warren County Circuit Court. The complaint, brought under the provisions of the Federal Employers Liability Act, sought to recover damages for personal injuries and/or death sustained by decedent Bennie Oakes while decedent was employed by Illinois Central and while engaging in interstate commerce. The decedent was employed by Illinois Central from 1952 through 1994 and alleged he was exposed to asbestos "on a daily basis."

The first trial occurred in 2011 but resulted in a hung jury. The jury in the second trial found in favor of Hagan and awarded $250,000; however, the jury also apportioned fault, with Illinois Central being twenty percent at fault and Oakes being 80 percent. Therefore, the circuit court adjusted the damages accordingly, and the total award was $50,000. Illinois Central filed a Motion of Entry of Judgment and Setoff to have the damages reduced further based on the fact that Hagan had received more than $65,000 in payments from asbestos trusts for Oakes's injuries and death. The circuit court denied the motion and entered judgment of $50,000 plus eight percent interest.

Illinois Central appealed, and the Court of Appeals framed the issue on appeal as "whether setoff against a jury verdict is required in Federal Employers' Liability Act cases where the claimant has already settled with separate tortfeasors." The Appeals Court held that "an allowance of setoff for recoveries from nonparty tortfeasors is inconsistent with the Act's intent, the statutory language, and Mississippi and U.S. Supreme Court precedent."

Illinois Central petitioned the Supreme Court of Missouri, arguing that the Court of Appeals decision was in "irreconcilable conflict with previous opinions…and disregards the controlling federal law on the issue." Illinois Central further argued that the Court of Appeals' decision erred in holding that the collateral source rule applied to asbestos trusts set up by the now-bankrupt manufacturers as a condition of their bankruptcy proceedings. Finally, Illinois Central contended that the Court of Appeals' decision effectively "obliterates" the one-recovery rule by allowing Hagan to collect from the asbestos trust for the asbestos-related injury and also from Illinois Central for the same asbestos-related injury.

The Supreme Court agreed with Illinois Central's reasoning, and held that Illinois Central was entitled to a setoff of the jury verdict based on Oakes's or Hagan's receipt of settlement funds from an asbestos bankruptcy trust if the funds compensated for the same injuries alleged in the instant lawsuit.

The Supreme Court further held that the record was "less than clear" that the settlements were to compensate for the same injuries as alleged in the instant lawsuit and remanded the case back to the Court of Appeals and circuit court for a hearing, if necessary, to determine whether the settlement indeed compensated the plaintiffs for the same injuries and the same type of damages as alleged in the lawsuit.

Read the full decision here.

Expert Challenges Decisions

Plaintiff's Experts Satisfy Daubert, Allowed to Testify in Brake Dust Exposure Case

(United States District Court, E.D. Arkansas, Western Division, December 11, 2018)

Ronald Thomas worked as a brake mechanic and manager at auto repair shops for approximately twelve years. In March of 2017, he was diagnosed with mesothelioma and subsequently passed away later that year. His estate brought product liability claims against multiple defendants for negligence and strict liability, alleging that exposure to asbestos in brake pads caused Thomas's mesothelioma.

The plaintiff brought forth two experts, Dr. Arnold Brody and Dr. Edwin Holstein, to support his theory. Dr. Brody is a professor emeritus of pathology with a doctorate in cell biology and Dr. Holstein is a medical doctor and clinical assistant professor. The defendant Ford filed motions to exclude the testimony of Drs. Holstein and Brody.

In asbestos-related products liability lawsuits, the plaintiff must prove both general and specific causation with expert testimony. General causation is proved by showing asbestos can cause mesothelioma, and specific causation is proved by showing how the plaintiff contracted mesothelioma.

Ford asserted that Dr. Brody's testimony should be excluded because he presents "a theory that is tantamount to the 'each and every exposure theory,' which some courts have held is unreliable. The court determined that the bases for Dr. Brody's opinions satisfy the ***Daubert*** standard, and denied the motion to exclude.

Ford additionally asserted that Dr. Holstein's testimony should be precluded because his reports do not show that exposure to chrysotile asbestos fibers in brake dust – the fibers that the plaintiff allegedly breathed in – can cause mesothelioma. The court opined that since Dr. Holstein examined plaintiff's career history and relied on published scientific studies, his methods are reliable. Furthermore, Dr. Holstein has been permitted to testify on specific causation based on similar methods in other cases.

The court denied both of Ford's motions.

New York's Highest Court Upholds Defense Judgment as a Matter of Law Based on Lack of Sufficient Scientific Evidence

(New York State Court of Appeals, November 27, 2018)

New York's highest Court issued its first decision addressing causation standards in an asbestos case, and upheld the trial and intermediate appellate court decisions granting Ford Motor Company judgment as a matter of law in ***Juni v. A.O. Smith Water Products Co. et al.***. ACT has previously reported on the ***Juni*** matter here and here.

The majority found that "[v]iewing the evidence in the light most favorable to plaintiffs, the evidence was insufficient as a matter of law to establish that respondent Ford Motor Company's conduct was a proximate cause of the decedent's injuries pursuant to the standards set forth in ***Parker v Mobil Oil Corp***., 7 NY3d 434 (2006) and ***Cornell v 360 W. 51st St. Realty, LLC,*** 22 NY3d 762 (2014). The majority did not include any analysis in support of its ruling.

In his concurring opinion, Judge Fahey wrote separately to clarify that he was joining the majority based on a particularized failure of proof and that he did not reach the broader issues of general and specific causation which grounded the Appellate Division's decision. Judge Wilson's concurrence clarified that he saw the plaintiff's failure of proof as being purely limited to general causation. He explained that "Ford adduced evidence that the process of manufacturing friction products under extreme temperatures alters the chemical composition of the asbestos, and the subsequent use of those products also subjects them to very high temperatures causing the conversion of the asbestos into a biologically inert substance called Forsterite." Judge Wilson held that these general causation factors were left unrebutted by the Junis' experts, and were in fact the subject of various concessions about their lack of engineering and industrial hygiene expertise to address these issues. Lastly, Justice Rivera wrote a dissenting opinion arguing that the there was sufficient evidence to remand the case back to the trial court for further consideration, which essentially adopted the rationale set forth in Judge Feinman's intermediate appellate court dissent.

Read the full decision here.

Defendant's Motions in Limine to Exclude Common Plaintiff's Experts Denied and Granted in Part in Railroad Case

(United States District Court, D. Kansas, October 21, 2018)

Asbestos Case Tracker brings you the following development in the previously reported Robert Rabe case. Click to read the factual background.

The defendant, The Budd Company (Budd) moved in limine to exclude the plaintiff's experts, Drs. Brody, Castleman and Frank. The court began its analysis with the standard for expert challenges: A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: a) the expert's scientific, technical or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; b) the testimony is based on sufficient facts or data; c) the testimony is the product of reliable principles and methods; and d) the expert has reliably applied the principles and methods to the facts of the case.

Arnold Brody - The court noted that Dr. Brody is a pathology professor who has concentrated his research on how asbestos causes lung disease and has written over 100 articles on lung cell biology, asbestos and lung disease. The defendant argued his testimony should be excluded as it is not helpful to the jury or simply does not satisfy the second part of the test. Specifically, the defendant took the position that Dr. Brody was not familiar with Mr. Rabe's condition and more importantly the effects of asbestos on humans. However, the court noted that several other courts have permitted Dr. Brody's testimony with respect to general causation. The defendant also argued that his testimony should be barred as any probative value is outweighed by the prejudice it would create. Specifically, his "magnified images" of cells would create a misleading impression to the jury according to the defendant. The court was not persuaded by this argument. Finally, Dr. Brody should be excluded because he would rely on an "each and every exposure theory" which is banned under the federal rules according to the court. The plaintiff countered that Dr. Brody would actually testify that asbestos related diseases are dose response diseases. Like the other points made by the defendant, the court was not persuaded and denied exclusion.

Dr. Barry Castleman - The well-known state of the art expert Dr. Castleman was also subject to challenge by Defendant. Defendant argued exclusion as Dr. Castleman is not qualified to offer medical opinions. This argument was rejected because the plaintiff noted that Dr. Castleman would not testify as to the diagnosis of asbestos disease. Second, the defendant took the position that Dr. Castleman's summary of literature would not help the jury because it was nothing more than a recital of medical literature. The defendant also claimed that Dr. Castleman "cannot establish the materials he relies on to support his opinions." The court disagreed and noted that his training and education and experience were sufficient to render his opinions. However, the court agreed that he could not offer opinion about corporate conduct or knowledge.

Dr. Frank-The court noted this motion was moot.

New York's Highest Court Set to Hear First Asbestos Causation Challenge

(New York Court of Appeals, October 16, 2018)

The New York Court of Appeals has set oral argument for October 16th, 2018 in ***Matter of NYC Asbestos Litig. (Juni v A.O. Smith)***. Since 2006, the Court of Appeals has weighed in three times[i] on the applicable causation standards in toxic tort cases, but ***Juni*** is the first asbestos related appeal to reach the high court. In this article, we provide a primer on the case and share a few thoughts about what to look for when the parties present their respective positions to the panel. The oral argument will be viewable live via webcast here, and the archived video and transcript of the proceedings should be available here a few days later.

Mr. and Mrs. Juni filed a New York City Asbestos Litigation action in 2012 asserting that Mr. Juni's pleural mesothelioma was attributable to his exposures to various manufacturers' products. Mr. Juni was first exposed to asbestos at several Orange & Rockland powerhouses while working during college as a driver in 1961, 1962, and 1963. While he was unable to provide any product identification at those work sites, he did describe significant thermal insulation exposures from a powerhouse that was in the process of being decommissioned. From 1964 to 1966, Mr. Juni worked as a third- and then second-class automotive and heavy equipment mechanic for Orange & Rockland. During this time, Mr. Juni did not personally perform any brake or clutch jobs, and was unable to quantify the frequency of brake work he observed being performed by others. In 1966, Mr. Juni transferred to the Spring Valley garage at Orange & Rockland, where he worked until his retirement in 2009. However, Mr. Juni did not allege any exposure after the fall of 1988, when Orange and Rockland issued respirators to its mechanics. Shortly after arriving at the Spring Valley garage, Mr. Juni was promoted to first-class mechanic, a role in which he spent only twenty-five percent of his time performing vehicle repair work. Mr. Juni was promoted to the title of working foreman in 1970, a position which was limited to assisting other mechanics.

The ***Juni*** case was assigned a trial date in the spring of 2014 before New York County Supreme Court Justice Barbara Jaffe, with only a handful of defendants remaining. However, shortly after opening statements, Mrs. Juni, then acting both as administratrix and in her personal capacity as Mr. Juni's wife, settled with all of the remaining defendants except for Ford Motor Company. At trial, Mrs. Juni called Drs. Stephen Markowitz and Jaqueline Moline as her causation experts.

In support of his general causation opinions, Dr. Markowitz relied on short-term industrial hygiene studies, which did not demonstrate time weighted vehicle mechanic exposures above existing OSHA permissible exposure levels. He further relied on epidemiology studies in the factory manufacturing setting and unspecified case reports. Upon cross-examination, Dr. Markowitz conceded that the available epidemiological studies addressing asbestos exposure in vehicle mechanics "do not show much evidence in support of a relationship between mesothelioma and exposure to friction products."

Dr. Moline was called as plaintiff's specific causation expert, where she conceded that she did not know the frequency with which Mr. Juni was exposed to asbestos from a Ford product. Indeed, while Orange and Rockland's vehicle fleet included a considerable number of Ford vehicles, crucially, the record at trial was silent as to the frequency with which Mr. Juni encountered asbestos containing brakes, clutches, and gaskets manufactured by Ford. Instead, Dr. Moline averred, without support in the record, that exposures from such products occurred "regularly."[ii]

Following a 20 day trail, the jury returned a plaintiff's verdict, finding Ford 49% liable and attributing the remainder of the liability to Orange and Rockland, which was not named in the suit. Thereafter, Ford moved for judgement as a matter of law or a new trial, and in the alternative for a remittitur of the jury's award of $8 Million for past pain and suffering and $3 Million for Mrs. Juni's loss of consortium. On April 13, 2015, Justice Jaffe handed down a forty page decision setting aside the verdict and awarding Ford judgement as a matter of law on the ground that the opinions of Drs. Markowitz and Moline were legally insufficient.[iii]

With respect to Dr. Markowitz, Justice Jaffe framed the issue of general causation as not being limited to whether chrysotile asbestos causes mesothelioma, but rather whether exposure to chrysotile asbestos as contained in friction products can cause mesothelioma. Justice Jaffe had reasoned that such an analysis was appropriate in light of various concessions by plaintiff's experts in relation to the manufacturing process and the thermal conversion of brake ware debris, which is rendered inert from the intense heat generated by the braking process. Justice Jaffe further rejected Dr. Markowitz's reliance on epidemiological studies related to factory manufacturing exposures as inapposite, as he conceded that the exposures in such occupational environments were considerably higher than those generally experienced by garage mechanics. Lastly, Justice Jaffe observed that even though profession-specific epidemiological evidence is not strictly required to establish general causation, Dr. Markowitz's concession that 21 of 22 epidemiological studies conducted of those who work with friction products yielded no evidence of an increased risk of developing an mesothelioma could not be ignored.

Turning to Dr. Moline's specific causation opinions, Justice Jaffe held that Dr. Moline's concessions with respect to her lack of knowledge concerning the frequency of Mr. Juni's exposures, her lack of expertise with respect to the composition of brake ware debris, and her failure to "even minimally quantify" Mr. Juni's exposures with respect to amount, frequency, or duration were disqualifying. Justice Jaffe further held that Dr. Moline's failure to compare Mr. Juni's exposures to those in the reported studies meant that she had failed to offer a "scientific expression" of Mr. Juni's exposure as required under New York law.

Justice Jaffe, also explicitly rejected two legal theories propounded by plaintiff's counsel. First, Justice Jaffe rejected the notion that the mere observation of visible dust is a legally sufficient basis to establish specific causation, as neither Dr. Moline nor Dr. Markowitz knew whether the dust at issue contained enough asbestos to cause mesothelioma. Second, Justice Jaffe dismissed the plaintiff's reliance on the cumulative theory of exposure as irreconcilable with the well-recognized scientific requirement, acknowledged by Dr. Moline, that the amount, duration, and frequency of exposure be considered in assessing the sufficiency of an exposure in increasing the risk of developing a disease.

Following the trial level decision, plaintiff appealed to the Appellate Division First Department, which issued a decision on February 28th, 2017.[iv] The majority opinion by Justice Saxe reaffirmed that even if it is not possible to quantify a plaintiff's exposure, causation from exposure to toxins in a defendant's product must be established through some scientific method, such as mathematical modeling based on a plaintiff's work history, or comparing the plaintiff's exposure with that of subjects of reported studies. He further rejected both the cumulative theory of causation and the notion that the mere presence of visible dust should be considered sufficient to prove specific causation.

While Justice Kahn joined the majority opinion, he also wrote separately to highlight the public policy roll, which is exclusive to the Court of Appeals. Justice Feinman, who has since been elevated to the Court of Appeals, issued a vigorous dissent, in which he argued that the majority misapplied the standard of review for legal sufficiency, and misapplied the law concerning general and specific causation in asbestos cases. Justice Feinman, asserted that visible dust "alone" is sufficient to establish that work with the friction products caused Mr. Juni's mesothelioma.[v] The dissent further argued that if the majority view was implemented "no asbestos litigant will be able to prevail."[vi]

The critical viewer of the coming oral argument should consider the following questions:

Did the trial court's foundational analysis view the evidence in the light most favorable to the plaintiffs?
Should asbestos be treated differently than other toxic substances on public policy grounds?

Is the "cumulative theory" of exposure consistent with plaintiff's burden to establish substantial factor causation with respect to each particular defendant in a multi-defendant case?
Do the terms "visible dust" or "regular exposure" constitute a "scientific expressions" of exposure?
Will the Court of Appeals reconsider adopting the ***Daubert*** standard?

It is a safe bet that no one can predict the outcome of this third, and likely final round of post-trial brinksmanship, however the make-up of the panel will certainly be the subject of much debate. The panel will consist of the honorable Justices Wilson, Fahey, Rivera, DiFiore, Stein, Garcia, and Feinman. Justice Feinman has twice not taken part in decisions to allow amicus filings before the Court of Appeals in the ***Juni*** matter and will surely recuse himself in light of his intermediate appellate level dissent. Notably, Justices Rivera, Stein, and Fahey concurred in the ***in utero*** gasoline vapor causation decision in ***Sean R***[vii], and Justice Rivera concurred with the ***Cornell***[viii] indoor mold causation decision***.*** The remaining justices on the panel have not had occasion to take part in any major toxic tort causation decisions.

Asbestos Case Tracker will continue to update this space regarding all relevant developments. In the meantime, feel free to download the zipfile with the complete set of briefs, or to provide your comments below and join the conversation.

[i] ***Sean R. v. BMW of N. Am., LLC***, 26 N.Y.3d 801 (2016); ***Cornell v. 360 W. 51st St. Realty, LLC***, 22 N.Y.3d 762 (2014); ***Parker v. Mobil Oil Corp.***, 7 N.Y.3d 434 (2006)

[ii] Under well-established New York law subjective descriptions of exposure are insufficient to establish the frequency of exposure. ***See e.g. Parker v. Mobil Oil Corp.***, 99 A.D.3d at 447 (rejecting the terms "frequent," "excessive," and "extensive" as unscientific expressions of exposure); ***Cleghorne v. City of New York***, 99 A.D.3d 443, 447 (1st Dep't 2012) ("Plaintiffs' expert, based only on this affidavit, characterized Cleghorne's exposure as "high-level." This was an insufficient basis for his theory, given that "replete" is a meaningless and vague quantifying adjective.")

[iii] ***In re New York City Asbestos Litig. (Juni)***, 48 Misc. 3d 460, 11 N.Y.S.3d 416 (N.Y. Sup. Ct. 2015)

[iv] ***In re New York City Asbestos Litig. (Juni)***, 148 A.D.3d 233 (N.Y. App. Div. 2017)

[v] ***In re New York City Asbestos Litig. (Juni)***, 148 A.D.3d 233, 248 (N.Y. App. Div. 2017)

[vi] Subsequent appellate decisions by the First Department have however distinguished the ***Juni*** decision where the plaintiff's experts have performed a dose estimate and compared the result to levels published in the epidemiological literature. ***E.g. New York City Asbestos Litig. (Miller)***, 2016 WL 1666776, at *5 (Sup. Ct. Apr. 25, 2016) ("[Plaintiff's Causation Expert] also testified that the dose calculation provided by plaintiff's [industrial hygine] expert of .024 fibers/cc for plaintiff's lifetime was a sufficient exposure to cause mesothelioma based on recent publications which show mesothelioma from this type of exposure") ***affirmed by In re New York City Asbestos Litig. (Miller)***, 154 A.D.3d 441, 441 (N.Y. App. Div. 2017), ***leave to appeal denied sub nom. Miller v. BMW of N. AM., LLC***, 30 N.Y.3d 909 (2018)

[vii] ***Sean R. ex rel. Debra R. v. BMW of N. Am., LLC***, 26 N.Y.3d 801 (2016)

[viii] ***Cornell v. 360 W. 51st St. Realty, LLC***, 22 N.Y.3d 762 (2014)

Supreme Court Rules Frye Standard Applies to Florida Cases, Overturns District Court's Decision Excluding Plaintiff's Experts' Causation Testimony

(Supreme Court of Florida, October 15, 2018)

The plaintiff Richard DeLisle filed a personal injury action against sixteen defendants, claiming that each caused him to be exposed to asbestos. Of the sixteen, DeLisle proceeded to trial against three: Crane, Lorillard Tobacco Co., and Hollingsworth and Vose (H&V). At trial, the plaintiff presented evidence that he was exposed to "Cranite" sheet gaskets containing chrysotile asbestos fibers and Kent cigarettes; the cigarettes were produced by Lorillard's predecessor, and the filters were supplied by a former subsidiary of H&V. The filters contained crocidolite asbestos.

Lorillard contested the plaintiff's use of Kent cigarettes, producing evidence from two of his high school friends who did not recall the plaintiff smoking and his ex-wife, who testified that he only smoked unfiltered cigarettes.

The parties "hotly disputed causation," and even the plaintiff's own experts did not agree on which products produced sufficient exposure to asbestos to constitute a substantial contributing factor to the plaintiff's disease. Although all of the plaintiff's experts agreed that the crocidolite asbestos in the Kent filters was a causative factor, they disagreed as to whether the other products were substantial contributing factors.

The plaintiff introduced causation expert opinions of Drs. Dahlgren, Millette, Crapo, and Rasmuson. Lorillard and H&V unsuccessfully moved to exclude their testimony under ***Daubert***. Crane, Lorillard, H&V, and plaintiff all moved for directed verdicts. The court denied the motions, and determined that Brightwater, plaintiff's former employer, and Owens-Corning, which manufactured asbestos-containing products that plaintiff worked with at Brightwater, should be included on the verdict form.

During the jury charge conference, Lorillard and H&V asked the trial court to instruct the jury on the threshold issue of whether the plaintiff ever smoked Kent cigarettes. The plaintiff opposed the instruction, and the court denied it, reasoning that the issue was "subsumed in the [standard] instruction."

The jury found Crane, Lorillard, H&V, Brightwater, and Owens-Corning liable in varying percentages after three days of deliberation. Crane appealed the trial court's denial of its motions for directed verdict and judgment notwithstanding the verdict and the trial court's admission of expert causation testimony. R.J. Reynolds also appealed the admission of expert testimony and both parties appealed the award as excessive.

The Fourth District reviewed the admission of the testimony of the experts under ***Daubert*** and found that the trial court "failed to properly exercise its gatekeeping function as to Drs. Dahlgren, Crapo, and Rasmuson" The Fourth District reversed for a new trial for R.J. Reynolds and reversed and remanded for entry of a directed verdict for Crane. The plaintiff appealed to the Supreme Court.

After a lengthy discourse on the legislative and procedural history of expert challenges in the United States and Florida, the court determined that the ***Frye*** standard, not ***Daubert***, "is the appropriate test in Florida courts." "***Frye*** relies on the scientific community to determine reliability whereas ***Daubert*** relies on the scientific savvy of trial judges to determine the significance of the methodology used."

The court further opined that "***Frye*** is inapplicable to the vast majority of cases because it applies only when experts render an opinion that is based upon new or novel scientific techniques." Further, the court stated that "a trial court has broad discretion in determining the range of the subjects on which an expert can testify, and the trial judge's ruling will be upheld absent a clear error."

The expert testimony in the instant case was properly admitted and should not have been excluded by the Fourth District because "medical causation testimony is not new or novel and is not subject to ***Frye*** analysis. Further, the court previously recognized that "asbestos products have widely divergent toxicities, with some asbestos products presenting a much greater risk of harm than others. Here, the trial court heeded our caution to 'resist the temptation to usurp the jury's role in evaluating the credibility of experts and choosing between legitimate but conflicting scientific views."

The court quashed the Fourth District's decision. "Furthermore, because the causation of mesothelioma is neither new nor novel, the trial court's acceptance of the expert testimony was proper." The court remanded to the Fourth District with instructions to remand to the trial court to reinstate the final judgment.

Read the full case decision here.

NYCAL Judge Rejects Causation Challenge; Reduces $75 Million Verdict to $17,250,000

(Supreme Court of the State of New York, New York County, October 11, 2018)

Late Thursday night, NYCAL Justice Joan Madden issued a long awaited post-trial motion decision in ***Robaey v. Air and Liquid Systems, et al***, NYCAL Index No. 190276/13, previously reported by ACT here. In January of 2017, a New York City jury returned a record setting $75 Million verdict, comprising $50 Million for plaintiff, Ms. Marlena F. Robaey ($40 Million in Past Pain and Suffering and $10 Million in Future Pain and Suffering), and $25 Million for derivative plaintiff, Mr. Edward Robaey ($15 Million for Past Loss of Consortium and $10 Million for Future Loss of Consortium). The verdict was found against two automotive gasket manufacturers, Dana and FelPro, who were both found reckless.

The Robaeys filed suit against numerous defendants in relation to Ms. Robaey's peritoneal mesothelioma, which was allegedly caused by take-home exposures from her husband's maintenance work at a local hospital and non-occupational automotive repairs performed in the plaintiffs' home. In a post-trial motion both Dana and Felpro challenged the sufficiency of the plaintiffs' causation evidence seeking judgement as a matter of law, and in the alternative for either a new trial or a substantial reduction of the $75 Million verdict. Dana settled with the plaintiffs during the pendency of the motion.

In her decision, Justice Madden granted the post-trial motion solely to the extent of reducing the jury award to $17,250,000, comprising $16 Million for Ms. Robaey ($12 Million in Past Pain and Suffering and $4 Million in Future Pain and Suffering), and $1,250,000 for Mr. Robaey ($1 Million for Past Loss of Consortium and $250,000 Million for Future Loss of Consortium.) Thursday's remitted award is nearly $8 Million dollars higher than the largest New York appellate sustained asbestos award to date, $9.5 Million. Notably, the remitted value also relates to the longest asbestos pain and suffering period remitted to date, (52 months of Past Pain and Suffering, and 12 months Future Pain and Suffering) The remitted awards therefore correspond to: $230K per month in Past Pain and Suffering, $333K per month in Future Pain and Suffering, $19.2K per month in Past Loss of Consortium, and $20.8K per month in Future Loss of Consortium.

With respect to causation, Justice Madden denied FelPro's challenge in its entirety. FelPro's causation challenge was premised primarily on the First Department decision in ***Juni***. (A primer on the ***Juni*** decision published by ACT in advance of the New York Court of Appeals oral argument to be held on October 16, 2018 can be found here.) In distinguishing ***Juni***, Justice Madden observed that while the ***Juni*** "decision indicates the claims at trial involved asbestos exposure from work on defendant's brakes, clutches and manifold gaskets, the decision addresses the quantification issues only with respect to brakes." She therefore reasoned that the ***Juni*** decision did not assail the legal sufficiency of visible dust testimony with respect to the automotive gaskets at issue. Justice Madden additionally found that despite the ***Juni*** decision's holding that the cumulative theory of exposure "is irreconcilable with the rule requiring at least some quantification or means of assessing the amount, duration, and frequency of exposure to determine whether the exposure was sufficient to be found a contributing cause of the disease," Dr. Markowitz's testimony that "the total cumulative exposure from all those opportunities for exposure and that dust from asbestos containing gaskets all contribute to the total dose that caused the disease" was credible to establish causation, so long as those exposures could be subjectively characterized as having "occurred repeatedly over a long period of time."
The court further rejected Felpro's post-trial challenge with respect to the jury's finding of recklessness and various evidentiary rulings.

Read the full decision here.

Plaintiff's Request for Reconsideration of Granting of Summary Judgment Denied in Railroad Take-Home Exposure Case

(U.S. District Court. W.D. Washington, September 30, 2018)

In an update to a case previously reported by Asbestos Case Tracker, The plaintiff's Motion for Reconsideration of the Court's Order granting summary judgment for Union Pacific Railroad has been denied.

By way of background, the plaintiffs alleged that Mr. Jack was secondarily exposed to asbestos from the work clothes of his father who worked at Union Pacific Railroad. The plaintiffs argued that the court failed to properly review 1) information provided by the plaintiffs' expert Dr. Barry Castleman; and 2) the court erred in its conclusion regarding the foreseeability of the risks of secondary exposure related to other legal opinions. The court quickly set the standard for reconsideration and noted that reconsideration is not favored. The elements required for successful reconsideration include 1) that the court committed a manifest error in its ruling and 2) that new facts or authority could not have been brought to the court's attention earlier. Here, the court noted that the plaintiffs did not submit Dr. Castleman's report when opposing the motion for summary judgment of Union Pacific Railroad. According to the court, the plaintiffs were seeking a "second bite at the apple." Moreover, the documents the paintiffs focus attention upon did not address the risks of secondary exposure to the families of asbestos exposed workers according to the court. Also, the court mentioned that the documents did not shadow Dr. Castleman's admission that Union Pacific would have found "practically nothing in print" had it wanted to research the risks of secondary exposure. The plaintiffs continued their argument and took the position that the court's decision was contra to other opinions. The Court was not persuaded by this argument as the plaintiffs had not previously raised this issue.

As for by-stander exposure, the plaintiffs argued that the court committed manifest error in concluding that Dr. Brodkin's report could not withstand a Daubert challenge. On the contrary, the court found that it had not subjected Dr. Brodkin to a Daubert challenge but rather found that Dr. Brodkin's "opinion, along with the plaintiff's other exposure evidence, was too imprecise to establish a reasonable connection between Mr. Jack's injury and Union Pacific's conduct." Finally, the court was not persuaded that Dr. Bodkin's evidence could have defeated summary judgment with respect to Union Pacific's motion.

Read the full case decision here.

Court Precludes Some but Not All Testimony of Naval Expert

(United States District Court, E.D., Virginia, September 28, 2018)

Following up with a prior ACT post on the ***Harry Goodrich*** matter pending in the United States District Court, E.D., Virginia, the Court has issued an omnibus opinion concerning motions in limine.

Among other issues decided, the court addressed the plaintiffs' motion to limit the testimony of defendants' naval expert, Margaret McCloskey (McCloskey). Pursuant to Rule 702, the plaintiffs sought to limit the testimony of McCloskey in four (4) respects: (i) as unqualified to opine about plaintiffs actual exposure to asbestos-containing thermal insulation or amosite while serving in the U.S. Navy; (ii) lacks factual basis for opining that the ships that plaintiff served on contained amosite thermal insulation; (iii) should be precluded from using photographs and/or videotapes of Navy vessels and insinuating that the insulation contains asbestos, amosite, etc.; and (iv) should be precluded from presenting speculative estimates of the tonnage of asbestos insulation, amosite, etc. onboard the ships plaintiff served on. The plaintiffs did not generally challenge McCloskey's expertise and specialized knowledge stemming from her education background and 27 year naval career.

Upon review of plaintiffs arguments, the court took into consideration McCloskey's education background and experience and noted McCloskey stated her experience "spans the operation, maintenance, repair, modernization, and construction of all classes of steam and nuclear[-]powered ships and submarines." McCloskey further asserted familiarity with "plans, designs, specifications, manuals, qualified products lists, departure reports, and other documents used in the construction and repair of [U.S.] Navy ... ships" and with "rate training manuals and correspondence course textbooks." Here, the court found sufficient factual basis existed for McCloskey to testify about the presence of thermal insulation, lagging, and other products containing asbestos, including amosite asbestos, onboard the ships upon which the plaintiff served. However, the court also found that insufficient facts and data existed to allow McCloskey's testimony to characterize and/or opine about the quantities and/or tonnage of the asbestos-containing thermal insulation (amosite), onboard when Goodrich served, and she is not qualified to testify about the plaintiff's actual exposure to the same.

On the issue the admissibility of photographs and videotapes of insulation in conjunction with McCloskey's testimony, the court punted and advised that issue will be addressed at the final pre-trial conference or at trial.

Thus, the plaintiff's motion in limine to preclude testimony of Margaret McCloskey was GRANTED in part and DENIED in part.

Read the full case decision here.

Plaintiffs' Causation Experts Stricken Under Daubert; Defendants' Motions for Summary Judgment Granted

(United States District Court, Middle District of Florida, September 25, 2018)

The plaintiff's Decedent Richard Doolin was diagnosed with mesothelioma in June of 2013 and passed away as a result on June 22, 2014. The plaintiff Stacey Doolin filed suit against multiple companies, alleging that Richard was exposed to asbestos when visiting his father's automotive workshop as a child. The plaintiff further alleged that Richard did shadetree automotive work throughout his life that also exposed him to asbestos. The last remaining defendants were Ford Motor Company (Ford) and Pneumo Abex LLC (Abex).

Ford and Abex filed several ***Daubert*** motions seeking to exclude the testimony of various experts, as well as motions for summary judgment. The court first determined that the dispositive issue in the case "is that of causation." The defendants filed motions to exclude the opinions of plaintiffs' causation experts, Arnold R. Brody, Ph.D., and Richard L. Kradin, M.D., D.T.M. & H.. After considering the record and the arguments of the parties, the court held that the expert testimony on specific causation lacked reliability under ***Daubert***, and therefore they were excluded.

The court then turned to the motions for summary judgment of defendants. In light of the conclusion that plaintiffs' experts on causation were excluded, and given the absence of any reliable testimony on the issue of specific causation, the Court held that Plaintiff failed to demonstrate an issue of material fact on causation, and therefore, summary judgment was ordered in favor of Ford and Abex.

Read the full case decision here.

Weight-of-the-Evidence Standard Used by Plaintiff's Experts Found to Satisfy Daubert Requirements

(United States District Court, N.D. Ohio, Eastern Division. September 5, 2018)

Defendant Honeywell International filed Motions in limine to preclude the plaintiff's Experts Dr. Murray Finkelstein and Dr. Carlos Bedrossian and dismiss the plaintiff's claims, or, in the alternative, its request for evidentiary hearing. The plaintiffs filed oppositions.

The court determined that both doctors utilized the weight-of-the-evidence standard in formulating their opinions of the case in line with the prescriptions under ***Daubert***. Additionally, Dr. Finkelstein's methodology had previously been scrutinized at a ***Daubert*** hearing in another jurisdiction and was upheld as valid and admissible.The court opined that the questions raised by defendants "do not undermine the admissibility of Dr. Finkelstein's testimony, but are better suited to addressing the credibility of his conclusions and the information he relied on.

The court denied both Motions in Limine.

Read the full case decision here.

Exclusion of Evidence Not an Abuse of Discretion; Judgment for Railroad Defendant Affirmed

(Supreme Court of Montana, August 14, 2018)

The plaintiff filed suit against Burlington Northern Santa Fe Railroad Company (BN) under the Federal Employers Liability Act (FELA) and the Locomotive Inspection Act (LIA). Specifically, Mr. Daley alleged he was exposed to asbestos while working at the Somers rail tie treatment plant from 1967-1986 when it closed. After a seven day trial, a verdict was entered finding BN had not violated FELA or LIA. The laintiff appealed arguing the trial court had abused its discretion on multiple evidentiary issues. The parties stipulated that the standard of review was abuse of discretion. At the outset of its analysis, the court noted that relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable."

BN's 2004 10-K Report:

BN had previously submitted a report to the Securities and Exchange Commission that admitted to BN employee exposure that was heaviest around a certain type of locomotive which was phased out between 1950-1967. This report was permitted to be used as a counter to the issue as to whether BN had placed profits over safety, an argument excluded by the court. BN objected to the form being enlarged as an exhibit in the plaintiff's opening. At sidebar, the court excluded the form stating that only stipulated exhibits could be used in opening. The plaintiff contended on appeal that the trial court's exclusion was an abuse of discretion. Specifically, the plaintiff "was not allowed to argue the truth" as to his work around the locomotives. BN took the position that even if the exclusion was an error it was a harmless one because the plaintiff's experts were able to testify as to his work around the locomotives. The court stated that the plaintiff had not established his claims were "substantially similar" and "not too remote" under the Faulconbridge opinion. Therefore, there was no abuse of the court's "broad discretion."

BN's Safety History:

The trial court had also excluded evidence related to BN's OSHA violations at other plants although it noted it may be admissible as habit evidence. However, it was excluded as prejudicial because the violations were not relevant to occupational exposure at the Somers Tie Plant. The plaintiff took the position that error occurred when the evidence was not permitted after BN argued that it was a leader in work place safety. BN countered that the statements had nothing to do with the plaintiff or his work at the Somers Tie Plant. The court found no error based on the remoteness of the OSHA evidence and the plaintiff's specific asbestos claim.

Depositions of Dr. Wang and Robert Fuller.

Both witnesses were deceased co-workers who had given prior deposition testimony in unrelated cases. Portions of their depositions were permitted by the trial court with certain portions excluded as they did not suffer from asbestos related diseases. At trial, BN referred to those depositions. On appeal, the plaintiff argued that BN "opened the door" and wrongly argued that Wang and Fuller had not been exposed to asbestos. The court agreed that BN may have violated the trial court order but noted that any effect was "minimal" on the plaintiff.

Exclusion of Mr. Funk:

The plaintiff also took exception with the trial court's decision to excluded another co-worker, Mr. Funk. Here, the plaintiff had not included Mr. Funk on the final pretrial order. Mr. Funk was only added after the plaintiff's medical expert had an emergency and trial was postponed. The plaintiff then added Mr. Funk on the second pretrial order. BN objected to the testimony of the late added witness. The plaintiff argued that BN misrepresented its "surprise and concealment" of this witness and that the trial court's exclusion was "hyper technical." The court was not persuaded by the plaintiff's relied upon cases as they were distinguishable. Moreover, the trial judge was in the better position to evaluate sanctions when an opponent's rights have been affected.

The plaintiff continued his argument that the he was denied a fair trial by BN's conduct at trial.

The plaintiff's return to the CARD Medical Clinic:

Here, the plaintiff conceded that he returned to medical treatment at the suggestion of his counsel. The plaintiff successfully had this evidence excluded for trial. However, BN was permitted to bring this evidence in after counsel for the plaintiff asked questions on direct that The plaintiff sought medical treatment for declining health. The court did not find this conduct to be unfair since BN obtained leave of the court prior to asking the leading questions.

Personalization of Mr. Liukonen:

The plaintiff also took exception with the questions asked by BN of its expert Larry Liukonen. Specifically, the plaintiff argued that BN's arguments were improper when it asked whether the people at the plant were his friends and " you don't go into this profession of industrial hygiene and safety because you don't care about people." The plaintiff contended that this line of questioning was improper and incited passion and prejudice. The court agreed that the line of questioning was improper but did not believe it was enough to persuade the jury.

Medical Experts:

The plaintiff also argued it was improper for BN to attack the credibility of his medical expert by stating that the plaintiff's counsel had worked "hundreds" of cases with them and that they even played golf with Dr. Whitehouse. However, the court noted that Evidence Rule 401 permits a party to delve into witness credibility when the court allows it.

Finally, the court reviewed whether the plaintiff was denied a fair trial to BN's alleged discovery misconduct. Here, the plaintiff filed a motion to compel discovery arguing BN's objections to discovery requests were improper. The court denied the motion as untimely as it was filed nearly 8 months after the close of discovery. The court was not persuaded that the denial was improper.

Moreover, the court found that the trial court's decision was not arbitrary. Accordingly, the decision was affirmed.

Read the full case decision here.

Plaintiff's Expert Causation Opinion Not Considered to be Each and Every Exposure Theory

(The United States District Court, Western District of Washington, August 10, 2018)

The United States District Court, Western District of Washington addressed several expert challenges including, among others, motions to preclude Dr. Ronald Gordon, Dr. Carl Brodkin, and Dr. Arnold Brody – all which involve the application of the "each and every exposure" and/or "cumulative exposure" theories. For a brief case background, this case centers around allegations that decedent developed mesothelioma, and ultimately passed away from the disease, due to occupational exposure to asbestos from work as a machinist in the Navy and in the Naval reserve from 1954-1962; as a machinist and piping instructor in a naval shipyard from 1967-1973; as a mechanic from 1962-1967; and from automotive work on personal vehicles from 1955-2001. The plaintiff relies upon a number of expert witnesses, including Dr. Gordon, Brodkin, and Brody, who opined on matters ranging from asbestos to medical causation.

With respect to the defendant's expert challenges to these opinions, Judge James L. Robart first addressed the admissibility of these theories and then applied that analysis and decision as to the qualifications and admissibility of each expert.

The court outlined the definition of the each and every exposure theory as “any exposure to asbestos fibers whatsoever, regardless of the amount of fibers or length of exposure constitutes an underlying cause of injury.” ***Krik v. Exxon Mobil***

Corp., 870 F.3d 669, 672 (7th Cir. 2017). The plaintiff experts also pursue the similar "cumulative exposure" theory, which argues the cumulative exposure to asbestos is the cause of the disease, but because each exposure, no matter how small, adds to that cumulative exposure, and each exposure became a substantial contributing factor. ***Id.,*** 870 F.3d at 672-673.

After reviewing the relevant precedent, including ***McIndoe v. Huntington Ingalls Inc.***, 817 F.3d 1170 (9th Cir. 2016), this court agreed that both of these theories are unreliable as they are not tied to the severity of exposure; are not based on sufficient supporting facts and data; cannot be tested; and do not have a known error rate. The court further emphasized these theories fail to address the frequency of, regularity of, proximity to, or the strength of the exposure in question – neither depend on any characteristic of the exposure at all. ***Id.*** at 1177.
In this case, the court concluded the "each and every exposure" and "cumulative exposure" theories were inadmissible under ***Fed. R. Evid. 702*** and the ***Daubert*** Standard, and next turned to whether the expert opinions of Dr. Gordon, Dr. Brodkin, and/or Dr. Brody rely upon the same:

Dr. Ronald Gordon:
The defendants challenged the admissibility of Dr. Gordon's testimony regarding his microscopic testing of decedent's lymph node tissues and raised three main arguments: (1) Dr. Gordon relies on the impermissible "every exposure" theory; (2) Dr. Gordon, although qualified to give opinions regarding microscopy, is not qualified to opine on the source of the detected fibers and (3) Dr. Gordon's focus on lymph nodes is unreliable. The plaintiff clarified its position to the court, advised that Dr. Gordon would not be offering an opinion in this case that each and every exposure to asbestos causes mesothelioma, and therefore, argument (1) became moot. The court did allow the defendants to renew its objection if Dr. Gordon proffers causation testimony during trial. Dr. Gordon was otherwise found qualified to testify as an expert and the defendants' motion was DENIED.

Dr. Carl Brodkin:
The defendants first challenged the admissibility of Dr. Brodkin's causation opinion as to brake dust. Here, the defendants argued that Dr. Brodkin concludes that because there is not a known threshold for safe exposure, no exposure is safe – and points to the inadmissible each and every exposure theory. The court disagreed and found that Dr. Brodkin's causation conclusions were not based on the theory that every exposure must necessarily be a substantial factor. Instead, Dr. Brodkin looked for an "identified exposure," and analyzed the duration, frequency, and intensity of exposures to determine whether an exposure is significant. The court also found Dr. Brodkin's exposure approach to be reliable in that he analyzed decedent's occupational and environmental history, including during an interview with decedent, and compared decedent's activities to the exposure associated with those activities documented in numerous published studies. Dr. Brodkin also factored in the asbestos content of the materials, and how often, how long, and where decedent worked with those materials***.*** The court concluded that Dr. Brodkin relied upon his significant experience compiling and analyzing occupational histories to then determine which of the exposures qualified as identified exposures. The defendants' challenge to preclude Dr. Brodkin's testimony as to brake dust was DENIED.

The court also DENIED the defendants challenged as to Dr. Brodkin's causation opinion as to clutch work for reasons not related to the each and every exposure theory.

Dr. Arnold Brody:
The defendants challenged the admissibility of Dr. Arnold Brody's causation testimony arguing he relies on the "every exposure" theory. Specifically, the defendants point out two paragraphs in Dr. Brody's expert report: (1) that "science has not identified an exposure to asbestos above background that does not induce mesothelioma"; and (2) that "every exposure to asbestos contributes to an individual's cumulative dose." The plaintiffs opposed and content that Dr. Brody will testify only matters of general causation, will not offer any case-specific testimony about the decedent, and maintain Dr. Brody will not attribute decedent's mesothelioma diagnosis to "every exposure" he had to asbestos. The Court ruled that neither of these statements with Dr. Brody's report ran afoul of ***Daubert*** as they are general statements of the science behind asbestos-related disease and the fact that every exposure adds to the total dose is an 'irrefutable scientific fact," and it is "well-established" that the threshold level for developing mesothelioma is unknown. Lastly, the court found that Dr. Brody does not make the inferential leap that is troublesome in the "every exposure" or "cumulative exposure" theories. Here, does not opine that because an exposure occurred and necessarily adds to the total dose, that single exposure must be a substantial cause.

Other Defense Challenges
The defendants also challenged the admissibility of Dr. William Longo (for his simulation studies) and Dr. Barry Castleman (for his historical overview of asbestos literature and his conclusion of when asbestos hazards became well known. The court found that Dr. Longo's simulation studies were not so dissimilar from the work plaintiff actually performed to warrant exclusion, and thus, declined to exclude these studies as unreliable. Similarly, the court found Dr. Castleman qualified to testify as to the specific issues set by plaintiff as this testimony is relevant and will assist the

jury in determining what any defendant knew or should have known based on the available literature. The defendants motions to exclude Dr. Castleman and Dr. Longo were both DENIED.

Naval Architect Not Qualified to Render Opinions as to Automotive Products

(The United States District Court, Western District of Washington, August 10, 2018)

The United States District Court, Western District of Washington addressed several expert challenges including the motion of the defendant Ford (Ford) to exclude Dr. Charles Cushing's statements regarding the plaintiffs' likely exposure to asbestos during automotive work.

For a brief case background, this case centers around allegations that decedent developed mesothelioma, and ultimately passed away from the disease, due to occupational exposure to asbestos from work as a machinist in the Navy and in the Naval reserve from 1954-1962; as a machinist and piping instructor in a naval shipyard from 1967-1973; as a mechanic from 1962-1967; and from automotive work on personal vehicles from 1955-2001.

In this case, the defendant Viad Corporation (Viad) offered Dr. Charles Cushing (Cushing), President of C.R. Cushing & Co., a firm of naval architects, marine engineers and transportation consultants, as an expert. Cushing reviewed decedent's deposition testimony, interrogatory answers, and personal records, along with materials relating to the use of asbestos by the U.S. Navy on naval vessels, and concluded that decedent was likely exposed to asbestos aboard naval vessels and at the Shipyard. Cushing also opined that decedent was likely exposed to asbestos when he worked on automobiles, which involved handling clutches, brakes and gaskets.

Ford moved to exclude Cushing's statements as to decedent's automotive work and argued that Cushing was a naval architect with expertise in naval ships and shipyards, not automobiles or the brakes, gaskets, and clutches used in automobiles. Here, Ford emphasized that Cushing may be 'plainly qualified to opine on the asbestos-containing products that were likely present on the naval and marine vessels [decedent] worked on," Cushing was not qualified to render opinions about the asbestos content of automotive products and asbestos exposure that might occur during automotive repair work.

Viad did not argue against this point and conceded Cushing was not an expert in automobiles. Rather, Viad argued that Cushing's opinion that decedent was exposed to asbestos from brakes is admissible as lay opinion testimony and ***Fed. R. Evid. 701*** allows lay testimony that is rationally based on the witness's perception, helpful to products would lead to asbestos exposure.

The court found in favor for the defendant Ford and excluded Cushing statement's as to exposure from automobile work. The court emphasized the determination of asbestos exposure is an issue that requires scientific, technical, and specialized knowledge, as evidenced by the many experts in asbestos cases, including this one, who opine on exposure. Here, Cushing has no analogous experience with automobiles and because Cushing's opinion on the decedent's exposure to asbestos from automobile products was not rationally based on Cushing's perception and requires specialized knowledge, the court declined to admit it as a lay opinion. Consequently, as Cushing was not qualified as an expert to render opinions about exposure as to decedent's automotive work under ***Fed. R. Evid. 702***, Ford's motion to exclude Cushing from testifying as to the same was GRANTED.

Failure to Timely Submit Supplemental Expert Report Leads to Denial of Motion for Leave

(Superior Court of Delaware, August 8, 2018)

The plaintiff moved for leave to submit a supplemental expert report after a change in substantive Ohio law. The court had previously granted summary judgment in favor of four defendants. Specifically, the defendants argued that summary judgment was proper based on the Ohio Supreme Court's recent decision in ***Schwartz*** which found theories advanced on cumulative exposure as invalid to establish substantial factor causation. In the instant matter, The plaintiffs submitted an expert report from Dr. Ginsberg 8 months prior to the deadline imposed by the pre-trial scheduling order. Dr. Ginsberg's report stated that it was his "opinion, to a reasonable degree of medical certainty, that the cumulative exposure from each company's asbestos product or products was a substantial contributing factor in the development of Mr. Richardson's malignant mesothelioma." Several months later, the court's decision in ***Schwartz*** was issued rendering the cumulative exposure theory insufficient to establish substantial factor causation. The plaintiffs moved for leave to supplement based on the new substantive law. The plaintiff took the position that they timely filed the original report 8 months prior to their deadline. Moreover, the change in substantive law did not take place until after the expert report was due. However, the Court pointed out that the plaintiff did not submit the motion for leave until 81 days after the expert report deadline and service of defendants' motions for summary judgment which cited the ***Schwartz*** opinion.

Accordingly, the court found no good cause or excusable neglect for the plaintiff's motion for leave. Therefore, the motion was denied.

Read the full case decision here.

Denial of Worker's Compensation Claim by employee of Scotts Miracle Grow Upheld on Appeal.

(Court of Appeals, Third District, Union County, July 30, 2018)

The plaintiff James Bennett filed a worker's compensation claim for his development of "pleural plaque" disease he attributed to asbestos exposure while working for Scotts Miracle Grow (Scotts). Bennett began receiving benefits for his claim but then filed for additional payments for his recent "asbestosis" diagnosis. The hearing officer denied his claim for asbestosis finding that the plaintiff had not established the disease process. The plaintiff appealed.
On appeal, the parties did not dispute that the plaintiff had been exposed to asbestos. Rather, Scotts contended the plaintiff was not entitled to benefits for asbestosis. Specifically, the plaintiff's treating physician, Dr. Kim, did not testify that Plaintiff had interstitial fibrosis as required by statutory definition. Instead, Dr. Kim took exception with the definition and stated that the statutory definition for asbestosis would only "encompass severe instances of asbestosis." He also conceded that scarring in the plaintiff's lower lobe could have resulted from something other than asbestos exposure. The plaintiff countered Scotts' position and argued that the trial judge erred by considering the deposition testimony of Scotts' expert, Dr. Grodner who concluded the plaintiff did not have pulmonary asbestosis. Relying on the ***State ex rel. Wallace*** opinion, the plaintiff asserted that his testimony should not have been considered because he did not treat the plaintiff. The court was not persuaded as that opinion was misplaced. Here, Dr. Grodner stated that asbestosis required a finding of interstitial fibrosis. That finding is accomplished by a CT scan. Moreover, Dr. Kim did not dispute that the CT scans lacked the interstitial fibrosis.
Consequently, the court affirmed judgment.

Read the full case decision here.

Talc Defendant Strikes Plaintiff's Expert and Avoids Spoliation Sanctions

(U.S. District Court, M.D. North Carolina, June 8, 2018)

The plaintiff Ann Finch's decedent Franklin Finch worked at a Firestone tire factory in Wilson, North Carolina from 1975-1995 and alleged that he was exposed to asbestos during his time there, causing his mesothelioma. Among other allegations of exposure, the plaintiff alleged that the decedent was exposed to talc-contaminated asbestos at Firestone, allegedly supplied by defendant Pfizer and others. In support of this allegation, the plaintiff offered an expert report from Sean Fitzgerald, who tested an identification badge worn by Decedent, and determined that it showed "asbestiform constituents, including fibrous talc." However, the plaintiff disclosed the existence of the report and the badge 15 months after initial disclosures in the case, and just a few days before the close of discovery. Pfizer moved to strike the report and testing of Mr. Fitzgerald, and the plaintiff moved for spoliation sanctions against Pfizer for an alleged failure to retain sales records.

Stating "the more important the evidence, the less justification the plaintiff has for her failure to disclose it," the court granted Pfizer's motion to strike the use of Mr. Fitzgerald's report and the badge to support her claims. The court noted that neither the decedent, nor three of his co-workers testified to any presence or use of talc at Firestone during relevant time periods. While acknowledging that the report could be used to establish a chain of evidence showing possible exposure to Pfizer products, the court determined that the plaintiff's failure to disclose the report and evidence was not excusable, and that Pfizer could not cure the "surprise" of it being disclosed at that point in the litigation.

The court also denied the plaintiff's motion for spoliation sanctions. The plaintiff had alleged that Pfizer's failure to preserve sales records prior to 1978 was sanctionable. The court determined that Pfizer acted reasonably in adhering to its document retention policies which resulted in the destruction of records periodically as a matter of course until they established litigation holds on the documents when they were first sued for a talc-related case in 1986. The plaintiff could not demonstrate that Pfizer had a duty to preserve the evidence, that it destroyed evidence related to her claims, or that it willfully destroyed evidence.

Read the full decision here.

Frustrated Court Denies Plaintiffs' Motion to Reconsider Exclusion of Kenneth Garza Due to Lack of Authority

(U.S. District Court for the Eastern District of Wisconsin, May 2, 2018)

In this case set for trial on June 4, 2018, the plaintiffs filed eleven motions under ***Daubert v. Merrell Dow Pharmaceuticals, Inc.,*** 509 U.S. 579 (1993) and various motions in limine. After hearing and argument, the court granted defendant Pabst Brewing Company's motion to bar, under ***Daubert***, Kenneth Garza's reports, opinions, and testimony, and granted the ***Daubert*** motion of defendants Sprinkmann, Employers Insurance Company and WEPCO's to exclude Garza's testimony. The court found that although Garza's training and background gave him the knowledge and expertise to qualify as an expert in the area of industrial hygiene, the plaintiffs had not demonstrated that his methods were reliable, especially since his general report contained nothing specific to the facts of this case. The plaintiffs filed a motion to reconsider, which the court denied.

The plaintiffs based their motion to reconsider on: (1) the ***Daubert*** factors; (2) Garza's facts, data, and assumptions; (3) Garza's new declaration attached as Exhibit 1 to the motion for reconsideration; (4) 296 pages of testimony from a ***Daubert*** hearing (involving Garza) in an unrelated Milwaukee County Circuit Court case; and (5) the absence of a ***Daubert*** challenge in the defense motions to certain opinions or report statements of Garza. The court noted: "Noticeably absent from the plaintiffs' motion is any reference to a rule authorizing the motion to reconsider, or to the standard for reviewing such motions."

While the Federal Rules of Civil Procedure did not expressly recognize a motion to reconsider, the court discussed various other federal rules and case law in seeking authority allowing for this motion. Specifically, Rule 54(b) allowed a court to review non-final orders, but as noted by several courts, motions to reconsider "'are viewed with disfavor…'". Motions to reconsider may address newly discovered evidence. However, the plaintiffs did not argue that any of the 37 exhibits attached to their motion or any of the three exhibits filed as supplemental authority constituted newly discovered evidence. "Rather, after over eight years of litigation and a scant four months before trial, the plaintiffs have filed a bevy of exhibits that are newly ***created*** or newly produced, but decidedly are not newly ***discovered***." The court summarized the lengthy steps taken in litigation. In filing these documents after the hearing, "…the plaintiffs have followed a disturbing pattern that has emerged over the course of the litigation in the consolidated cases—a practice of filing, amending or supplementing pleadings or documents after deadlines have expired, one that has contributed to the procedural quagmire of this litigation."

The plaintiffs did not argue that the district court's decision to bar Garza's testimony constituted a wholesale disregard of controlling precedent. While the plaintiffs argued that the court's conclusion that Garza's methodology was unreliable, nothing in the plaintiffs' hundreds of pages of reconsideration material demonstrated a manifest error of fact or law. In contrast, neither Garza's reports nor his deposition testimony provided any basis for the court or the defendants to assess his methodology for reliability.

The district court also analyzed the plaintiffs' motion for reconsideration under the "law of the case" exception, which authorized reconsideration if there was a compelling reason, such as a change in the law that makes clear that the earlier ruling was erroneous. Here there was no change or clarification in the law, and the plaintiffs did not argue that the court's decisions were clearly erroneous. The court also rejected the plaintiffs' arguments that they should be allowed to present certain of the conclusions/opinions Garza stated in an "amended" report on the sole basis that the defendants did not specifically challenge those opinions/conclusions.

Read the full decision here.

Insufficient Evidence to Show Chrysotile Flooring Products Caused Plaintiff's Peritoneal Mesothelioma

(Supreme Court, State of New York, Nassau County, April 18, 2018)

The court granted summary judgment for two flooring manufacturers in this peritoneal bystander mesothelioma matter. Plaintiff Victoria Pistone alleged that she was exposed to asbestos from vinyl floor covering manufactured by Mannington Mills, and tile manufactured by American Biltrite, while she accompanied her father to work, and in their home from his clothing.

The court cited prior New York law in noting that a plaintiff must use a causation expert to establish that the plaintiff was exposed to sufficient levels of asbestos from the products in question to have caused her disease. The court first determined that the defendants met their burden of demonstrating that their respective products could not have

contributed to the causation of the plaintiff's peritoneal mesothelioma through the affidavits of certified industrial hygienists Mark F. Durham and John W. Spencer, and pulmonologists Allan Feingold and James D. Crapo. Both industrial hygienists opined that the low levels of airborne asbestos that could possibly have emitted from the defendants' products would have had a negligible contribution to a lifetime exposure of asbestos. Both medical experts opined that chrysotile asbestos was not a cause of peritoneal mesothelioma.

Having accepted that the defendants' products were not the general or specific cause of the plaintiff's peritoneal mesothelioma through defendants' experts' affidavits, the burden shifted to the plaintiff to establish the existence of material issues of fact. In an attempt to meet this burden, the plaintiff used inadmissible reports from certified industrial hygienist Steven Paskal and Dr. Josephine Moline, and an affirmation by pathologist David Y. Zhang. The court determined that neither Paskal nor Moline presented evidence establishing that the extent and quantity of dust to which the plaintiff was exposed from the defendants' products was sufficient to cause her disease, or that this dust contained enough asbestos to cause the peritoneal mesothelioma. While Dr. Zhang opined that chrysotile asbestos could be a cause of peritoneal mesothelioma, the court determined that he did not provide adequate scientific support for this conclusion in the reports that he relied upon. In granting summary judgment and dismissing all claims against the defendants, the court stated, "(i)n conclusion, there is no evidence that chrysotile asbestos causes peritoneal mesothelioma nor is there evidence that the plaintiff was exposed to amounts of chrysotile asbestos from Mannington Mills or American Biltrite's products sufficient to have caused her disease."

Read the full decision here.

Expert's Asbestos-Location Map Admissible Only For Plaintiffs With Exposures Within Entire Date Range Depicted by Map

(Superior Court of the Virgin Islands, Division of St. Croix, April 24, 2018)

Defendant Hess Oil Virgin Island Corporation (HOVIC) filed a motion in limine to exclude a map prepared by the plaintiffs' expert Martin D. Barrie, Ph.D. in this matter that consolidates the lawsuits of 123 individuals alleging expose to asbestos while working at a HOVIC operated refinery on the island of St. Croix. The map in question condensed 23 pages of data produced in discovery by HOVIC, and depicted all places that asbestos was found at the St. Croix refinery based on sample testing that occurred from 1982 to 1999. HOVIC argued that the map was unduly prejudicial, that it was a compilation of more than 20 years of data, and that it failed to show subsequent remediation efforts that occurred at the refinery during the same time period. The plaintiffs argued that the map was merely a visualization of admissible information produced by HOVIC.

The court analyzed the facts under the Virgin Islands Rules of Evidence, which parallel Federal Rule 1006 in pertinent parts. It noted that the "master case does not proceed to trial.'…The individual cases do." Because each piece of evidence on which a summary relies must also be admissible independently, the court determined that the map would be unfairly prejudicial in an instance where an individual plaintiff did not work at the St. Croix refinery for the entire time period depicted in Dr. Barrie's map. Thus, the motion was granted as to these types of plaintiffs. However, the court denied the motion as to the plaintiffs for whom the underlying evidence and its associated time periods would be applicable.

Read the full decision here.

Proposed Testimony of Plaintiff's Expert, Dr. Arnold Brody, Precluded as Being Cumulative

(U.S. District Court for the Western District of Washington, March 30, 2018)

In this case, the plaintiff had already presented testimony from occupational and environmental medicine physician, Dr. Carl Brodkin, on the impacts of asbestos on the body. The plaintiff then was looking to call Dr. Arnold Brody to also provide expert opinion on this subject. The defendant objected, arguing that both experts testimony is substantially similar and should be precluded as cumulative. The court agreed.

In its decision, the court outlined the proffered testimony of Dr. Brody and stated that his testimony would have minimal value to the case. The court then went on to state that "the similarity between Dr. Brodkin's testimony and Dr. Brody's proffered testimony goes beyond mere overlap and instead, crosses into the unnecessarily cumulative. Both offer insight on the body's natural defenses against fiber inhalation and what occurs when those natural defenses fail. Both instruct on the consequences of asbestos fibers that are deposited along the respiratory tract, including the resulting

scarring on the lungs and pleura. Both detail the damage asbestos fibers can have on cell division, resulting in errors in cell growth and ultimately, the development of lung cancer and mesothelioma. Finally, both remark on the dose-responsive nature of the disease and its lack of cure. The degree of similarity between the two expert testimonies is illustrated succinctly by the fact that the two experts' respective PowerPoint presentations feature some identical slides. This danger of presenting needlessly cumulative evidence substantially outweighs the minimal probative value of Dr. Brody's testimony." (internal citations omitted)

Read the full decision here.

Valve Manufacturer's Renewed Motion for Summary Judgment Granted Based on Preclusion of Plaintiff's Expert Witness

(U.S. District Court for the District of South Carolina, March 29, 2018)

In this mesothelioma case, the plaintiff, James Chesher, sued alleging asbestos exposure while serving as a machinist mate and commissioned officer in the Navy from 1965 to 1989. Defendant Crane had moved for and was denied summary judgment. However, Crane's motion to preclude the plaintiff's causation expert, Dr. Carlos Bedrossian, was granted. The plaintiff moved for reconsideration of the preclusion of his expert and Crane moved to renew its motion for summary judgment.

The parties agreed that maritime law applied. The court upheld the expert witness preclusion "because it found that under Federal Rule of Evidence 403, the probative value of the testimony is substantially outweighed by a danger of unfair prejudice, confusing the issues, and misleading the jury." The court further stated that "Bedrossian's opinions on specific causation essentially amount to the 'every exposure' theory that Lindstrom rejected—a position that has been affirmed in subsequent decisions applying maritime law." The court then granted Crane's motion to renew its motion for summary judgment stating that because the plaintiff "has failed to put forth sufficiently specific evidence of substantial exposure, the court finds that he has failed to establish that Crane's product was a substantial factor in causing the injury he suffered. Having failed the substantial factor test, and having no expert testimony on specific causation, Chesher has not established a prima facie case under maritime law for a products liability mesothelioma action."

Read the full decision here.

Case Remanded after Appeals Court Finds Plaintiff's Expert Unreliable

(Court of Appeals of Texas, March 29, 2018)

The plaintiff Leonard Baca, alleged that while working for defendant BNSF's predecessor in interest, he was exposed to asbestos, causing him to develop asbestosis. The plaintiff retained an expert, Dr. Alvin Schonfeld, a pulmonogist, who provided a report in which he concluded that Baca's asbestosis was causally related to his exposure to asbestos during his employment. BNSF moved to exclude Dr. Schonfeld's causation opinion as inadmissible because it was unreliable under well-established case law. The trial court denied the motion, but also granted permission in its order for BNSF to immediately appeal, finding that the order involved a controlling question of law as to which there was a substantial ground for difference of opinion. The order further stated that "an immediate appeal from the order would material advance the ultimate termination of this litigation."

The sole issue on appeal was "whether the Federal Employers Liability ACTs (FELA) lower causation standard—i.e., whether a railroad's negligence played any part, even the slightest, in bringing about the injury—makes inapplicable the expert admissibility standards expressed in cases like…"

The appeals court held that the expert admissibility standards espoused in ***E.I. DuPont de Nemours & Co. v. Robinson*** and ***Merrell Dow Pharmaceuticals, Inc. v. Havner*** apply to actions brought under FELA. A plaintiff must show a causal connection between his exposure to asbestos and a disease he suffers from via expert testimony as it is outside the knowledge of a lay person. The appeals court agreed that Dr. Schonfeld's causation opinion was unreliable, and therefore inadmissible, and remanded the case for further proceedings.

Read the full decision here.

Plaintiffs' Experts Permitted to Testify Regarding Conspiracy Claims

(U.S. District Court for the District of Delaware, March 14, 2018)

Defendant Crane Company filed motions to strike the plaintiff's expert reports from James A. Bruce, M.D., Barry Castleman Sc.D, and Captain Francis J. Burger as violating Federal Rules of Evidence 402 and 702 in this lung cancer case that was removed to Federal Court. The plaintiff alleged asbestos exposure through his work on two ships in the U.S.Navy, and through his work as a salesman. Only one count remained from the plaintiff's Fourth Amended Complaint following Crane's summary judgment motion, and it alleged that Crane and others conspired to suppress and misrepresent the hazards of asbestos. In its motion to strike, Crane argued that none of the experts' reports set forth any opinions on the plaintiff's sole remaining claims against it.

The court analyzed the motion through the "fit requirement" of ***Daubert,*** which goes primarily to relevance***.*** It acknowledged the plaintiff had the burden to demonstrate the admissibility of its experts' opinions, but that the standard was not high. This burden was met "when there is a clear 'fit' connecting the issue in the case with the expert's opinion such that it will aid the jury in determining an issue in the case."

The court denied Crane's motions with respect to Dr. Bruce and Dr. Castleman. As to Dr. Bruce, the court reasoned that before proving a conspiracy, the plaintiff must first show the plaintiff's lung cancer was caused by asbestos exposure. Because Dr. Bruce's opinion made that connection, the court deemed it relevant despite its silence as to conspiracy. Regarding Dr. Castleman, the plaintiff offered evidence that he would testify regarding Crane's knowledge of the hazards of asbestos, an issue that the court considered relevant to conspiracy claims.

The court had previously reviewed Captain Burger's report in granting in part Crane's motion for summary judgmenton product identification and nexus grounds. Though it was insufficient to establish issues of fact relative to the plaintiff's exposure to Crane products, and was silent on conspiracy, the court reasoned that Captain Burger's testimony could be contributory in establishing asbestos exposure causation for the plaintiff's lung cancer. As such, they denied Crane's motion with respect to Captain Burger, without prejudice to Crane's ability to renew the motion after the close of expert discovery.

Read the full decision here.

Plaintiff's 'Every Exposure" and 'Cumulative Exposure" Theories Unreliable; Various Plaintiff's Experts Excluded

(U.S. District Court for the Western District of Washington, February 12, 2018)

Defendant Scapa Dryer Fabrics, Inc. filed motions to exclude the plaintiff's exposure and causation experts in this mesothelioma death matter. The Ninth Circuit remanded this matter for a new trial after finding that the District Court failed to make appropriate determinations under Daubert and Federal Rule of Evidence 702 in allowing expert testimony. The plaintiff alleged asbestos exposures during work at the Crown-Zellerbach Pulp and Paper Mill in Camas, WA. The plaintiff worked with dryer felts, among other products, in his time at the Camas Mill from 1968-2001. Now the District Court found that the "every exposure" and "cumulative exposure" theories were unreliable, and granted the defendant's motion in part, precluding testimony of the plaintiff's epidemiology and occupational medicine experts along with quantitative testimony from the plaintiff's industrial hygienist.

Scapa challenged the testimony of the plaintiff's exposure experts and the studies on which they relied. Scapa argued that the conditions under which the plaintiff's experts analyzed fiber release were not sufficiently similar enough to the conditions at the Camas Mill where the plaintiff worked. The court denied this motion, determining that Scapa's concerns went to the weight of evidence, not the admissibility. However, the court precluded quantitative testimony from the plaintiff's industrial hygienist, finding that there was no adequate methodology supporting the industrial hygienist's estimated exposure range.

In analyzing Scapa's motion to exclude the plaintiff's causation experts, the court went through the body of law that exists that has determined that "every exposure" and "cumulative exposure" theories were unreliable. The court determined that "both theories lack sufficient support in facts and data and thus are not the product of reliable principles and methods as required by 702." Having made that determination, the court looked at each causation expert's opinion to determine whether it relied on those theories. It granted Scapa's motion as to the plaintiff's epidemiology expert, concluding that the expert did not consider disqualifying any of the plaintiff's asbestos exposures in determining his disease course. Further, the court granted Scapa's motion as to its occupational medicine expert, who opined that "any exposure that an individual suffered that were in addition to ambient air levels ... would, on a more likely than not basis, have been a substantial factor in causing the alleged disease." The court determined that this language was nearly identical to previously excluded "every exposure" opinions in prior decisions, and that it was the expert's general opinion, and not specific to the plaintiff.

Read the full decision here.

Failure to Establish Good Cause Leads to Affirmation of Denial of Additional Expert Disclosure

(U.S. District Court for the District of Kansas, February 13, 2018)

The plaintiff sued the Budd Company alleging her father, Robert Rabe, developed mesothelioma as a result of occupational exposure to asbestos for which the defendant was allegedly liable. Specifically, Rabe claimed exposure to pipe insulation used on railcars built by the defendant.

A scheduling order was entered by the magistrate, which called for the disclosure of experts by June 23, 2012 amongst other deadlines. After that deadline passed, the defendant moved without objection for a modification of the expert disclosure deadline to September 30, 2017. The court granted the motion to modify. The defendant then disclosed 8 experts by the deadline and emailed the plaintiff the name of an additional expert on November 6, 2017. The email stated that Dr. Burgher would offer "general, state of the art opinions regarding the historical knowledge of the hazards of asbestos." The defendant then moved for leave to add an expert and to reopen discovery for a limited purpose. The motion was denied after the Magistrate concluded that no cause existed for the relief sought. Budd filed objections to the denial claiming that the Magistrate applied the wrong standard.

The court began its analysis and noted that Federal Rule of Civil Procedure 16(b)(4) permits a modification of the scheduling order upon a showing of good cause. Here, the Magistrate found that defendant had not established that it couldnt have met the original deadline. The defendant countered and took the position that the court permits modification under the "four factor Test" laid down in the ***Summers*** and ***Rimbert*** decisions. Further, the defendant argued that the "good cause" test was applied to amendment of pleadings rather than a modification of the scheduling order. The court agreed that the ***Summers*** case allowed a newly designated expert when four factors are met. The same applied in ***Rimbert*** according to the court. However, those cases dealt with experts being added after ***Daubert*** challenges where no surprise could be argued by the other party. Additionally, trial dates were not yet set meaning the parties suffered no prejudice from the additional expert disclosure. The court noted that this case was different from ***Summers*** and ***Rimbert.*** Specifically, the Budd Company had not been subject to an adverse ***Daubert*** ruling. Further, the defendant had only provided a "generic" description of the anticipated testimony of Dr. Burgher.

Accordingly, the court found that the Magistrate did not apply the wrong legal standard. The objections were overruled.

Read the full decision here.

Other Expert Challenges Decisions

- Damage Decisions
    - **Post-Trial Motions Denied Against Both Plaintiff and Defendant on Damages and Judgment as a Matter of Law**
      (U.S. District Court, W.D. Washington, June 4, 2018)

Federal Officer Jurisdictional Decisions

Remand Granted After Shipyard Defendant Fails to Establish Causal Nexus Required By Federal Officer Removal Statute

(United States District Court, E.D. Louisiana. September 25, 2018)

The plaintiffs filed this action against many defendants including Huntington Ingalls (Avondale) alleging their decedent contracted mesothelioma as a result of exposure to asbestos while working at Avondale Shipyard from 1964-1972. Avondale removed the case asserting Federal Officer Removal Statute. The plaintiff moved to remand arguing that Avondale could not satisfy the elements required under Federal Officer Removal Statute.
According to the court, Avondale must show that it 1) that the person is within the meaning of the statute 2) that it has a colorable federal defense 3) that is acted pursuant to a federal officer's directions and 4) that a casual nexus exists between its actions under color of federal office and the plaintiff's claims in order to assert Federal Officer Removal Statute.

The plaintiff took the position that Avondale's removal was untimely. The controlling statute required removal within "30 days after receipt of a plaintiff's initial pleading setting forth for relief upon which such action or proceeding is based." However, if the initial pleading does not state assertions to remove, then a notice to remove must be filed within 30 days after receipt by the defendant of a pleading from which removal may be ascertained. Here, the initial pleading was filed March 21, 2018. Avondale removed the case on July 19, 2018. Clearly the removal was more than 30 days after Avondale received the initial pleading. The court then turned its attention to whether Avondale could have ascertained that the case was removable from the initial pleading. The court noted that the plaintiffs' complaint disclaimed conduct Avondale took under direction of the government. The court characterized that this disclaimer was an effort for Plaintiffs to have their cake and eat it too. On the other hand, Avondale argued that it only became aware that the case was removable during the deposition of Tex Martinez. During that deposition, Avondale learned for the first time about allegations of exposure onboard a specific federal ship at Avondale. Avondale removed the case within 2 weeks after the deposition and therefore the removal was timely.

The plaintiff then argued that the defendant failed to establish the causal nexus requirement for removal under Federal Officer Removal Statute. The element at issue required Avondale to show that there exists a causal nexus between its actions under the direction of the federal government and the conduct underlying the suit. The plaintiffs took the position that they disclaimed their strict liability claims and therefore Federal Office Removal Statute was inapplicable because the claims were sounded in negligence. Relying on the Boyd decision, Avondale countered and stated that the disclaimer was not enforceable. The court disagreed as the disclaimer was one separate from the earlier boilerplate disclaimer. Moreover, the court could not enforce the plaintiff to make a claim it was not asserting. Consequently, remand was granted.

Elements for Removal Found Under Federal Officer Jurisdiction in Take-Home Mesothelioma Case

(U.S. District Court, E.D. Louisiana, September 25, 2018)

The plaintiff filed suit against several defendants including Kaiser Aluminum (Kaiser) and Huntington Ingalls (Avondale) alleging her mother, Dolores Punch, contracted mesothelioma from exposure to asbestos while washing the work clothes of her husband and son. Mr. Punch worked as a pipefitter and welder at Avondale Shipyard from 1948-1960 and at Kaiser Aluminum from 1961-1967 handling the same material. The decedent's son also worked as a helper and pipefitter at Avondale from 1976-1979. Avondale removed the suit to federal court asserting the Federal Officer Removal Statute.

The court quickly began its analysis to determine whether 1) that the person is within the meaning of the statute 2) that it has a colorable federal defense 3) that is acted pursuant to a federal officer's directions and 4) that a casual nexus exists between its actions under color of federal office and the plaintiff's claims. The court delineated the facts of this matter to the above standard and found:

Avondale is a person under the statute. The plaintiff did not dispute that the meaning of person includes both private persons and corporate entities. According to the court, Avondale has a colorable federal defense. At this stage, the removing party need not prove the defense but rather need only illustrate that it has a colorable defense. Relying on the standard set forth in the ***Boyle*** decision, the Court noted that Avondale had successfully asserted the "contractor defense". As for whether the defense applies, the plaintiff argued generally that the government contractor defense is applicable in design or defect cases and not in failure to warn case. The court was not persuaded as the Fifth Circuit

had resolved that issue and decides that the defense applies to both defect and failure to warn cases. The plaintiff also raised the issue that she only made her failure to warn case against the manufacturers in this case and not against Avondale. However, the court pointed out that the plaintiff's own petition contradicted her position by asserting failure to warn against the defendants generally. The court was persuaded that Avondale had illustrated it built ships in accordance with the contracts of the federal government. Moreover, Avondale warned the government of the dangers of asbestos and proved this through use of affidavits. As to whether Avondale acted pursuant to the Federal Officer's direction, the court was equally satisfied Avondale met the element. The court noted the plaintiff's conclusory assertions to the contrary. Finally, as to the causal nexus element, the Court recognized that the plaintiff's request to amend her strict liability claim against Avondale occurred after the removal. The causal nexus element is met in the strict liability claims when the defendant shows it used asbestos pursuant to its contractual obligations. However, when the complaint is lodged in negligence for failure to warn removal may be inappropriate. The plaintiff argued that she did not file for strict liability and will amend the complaint if necessary. However, the court found the opposite in plaintiff's already amended complaint. Recognizing that plaintiff desires to amend to avoid the fatal issue as to remand, the court found that at the time of removal strict liability claims existed. Therefore, the Motion to Remand was denied.

Read the full case decision here.

Lack of Federal Officer Subject Matter Jurisdiction Leads to Grant of Remand and Award of Fees

(September 9, 2018)

The plaintiff filed this action alleging he developed mesothelioma as a result of exposure to asbestos for which the defendants were liable. Specifically, the plaintiff claimed exposure while serving in the United States Navy onboard the U.S.S. Tortuga from 1956-1959.

Defendant Aurora Pump Company (Aurora) removed the case the federal court asserting Federal Officer Removal. The plaintiffs moved to remand. The court began its analysis by stating that removal may be invoked when a defendant establishes that 1) that it is a person within the meaning of the statute 2) that it can assert a colorable federal defense and 3) there is a casual nexus between its actions, taken pursuant to a federal officer's directions, and plaintiffs' claims. The court quickly found that Aurora had not established a federal colorable defense under the Government Contractor Defense. The defense may be asserted when the 1) United States approved reasonably precise specifications; 2) the equipment conformed to those specifications; 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. The court noted that Aurora satisfied the first two prongs of the test. However, Aurora failed to warn the government about the dangers of its equipment according to the court. Moreover, the court noted that alternative material in its equipment could have been used. Specifically, the government guidelines suggested that the government would consider alternatives from those specified by the government. Aurora countered and argued that the Navy was aware of the dangers of asbestos and therefore it had no duty to warn. The court was not persuaded by what it called "non-binding" authority submitted by Aurora to support its contention. The court found that Aurora had not established a federal colorable defense and therefore remanded the case. The court further awarded the plaintiff's request for attorney's fees.

Defendant Fails to Meet Removal Requirements under 28 U.S.C. § 1442(a)

(United States District Court, C.D. California, September 19, 2018)

The plaintiff Randolph Morton (Plaintiff or Morton) filed this personal injury claim in California state court alleging that Morton's asbestos-related disease was allegedly caused by the defendants' acts and omissions involving the use of asbestos at or in the vicinity of Morton's workplace.

The defendant removed the case to federal court (United States District Court, Central District of California) based on federal office removal jurisdiction under 28 ***U.S.C.*** § 1442(a). Here, defendant seeks to put forth the government contractor defense, which outlines that military contractors cannot be held liable under ***state law*** for any injuries caused by the work performed on equipment supplied by the U.S. military when three (3) elements are present: (i) the United States approved reasonably precise specifications; (ii) the work performed conformed to these specifications; and (iii) the government contractor warned the military about any hazards involved in the equipment or services it was contracted to supply that are known to the government contractor but not known to the military. ***See Boyle v. United Technologies Corp.***, 487 U.S. 500, 512 (1988).

The plaintiff argues that defendant failed to meet the requirements that are needed for § 1442(a) removal. The plaintiff emphasized that defendant failed to introduce any evidence that contract specifications had a causal nexus to plaintiffs'

claims nor any evidence of Navy policies restricting the safety procedures available to government contractors handling asbestos.

The court ultimately found that defendant failed to demonstrate that it had a "colorable defense". While acknowledging that the Navy requires strict compliance with precise specifications in many facets of shipbuilding, maintenance and repair, the court emphasized that defendant failed to provide any evidence that such specifications placed limits on defendants ability to implement precautions to protect and warn against the dangers of asbestos.
In conclusion, as defendant failed to establish the necessary requirements for removal under 28 ***U.S.C***. § 1442(a), and no opposition was submitted by another defendant, plaintiff's motion to remand was granted.

Read the full case decision here.

Federal Officer Removal Statute Found Inapplicable in Negligence Claim Against Shipyard Defendant; Remand Granted

(U.S.District Court E.D. Louisiana, June 12, 2018)

The Plaintiff Gregory Brown, brought this action against several defendants including Avondale Shipyard (Avondale) claiming that he developed lung cancer from exposure to asbestos while working for Avondale at its shipyard on and off from 1967-1971. Specifically, Mr. Brown worked as a cleanup man, tacker, and insulator helper. He also claimed exposure to asbestos from his employment for other employers from 1965- 1978. The plaintiff was deposed and gave testimony regarding his work on ships while at Avondale but did not state that the ships were owned by the U.S.Navy or U.S.Coast Guard. Of note, the plaintiff sued Avondale on a negligence theory but did not assert a claim for strict liability.

Avondale removed the matter to the U.S.District Court pursuant to Federal Officer Removal Statute. Avondale argued that it "was acting under the authority of an officer of the United States." The plaintiff moved for remand and took the position that the Federal Officer Removal Statute was not applicable because he did not bring a strict liability claim against Avondale. The Court began its analysis and stated that a defendant is required to show (for Federal Officer Removal)"1) that it is a person within the meaning of the statute, 2) that it has a colorable federal defense, 3) that it acted pursuant to a federal officer's direction, and 4) that a causal nexus exits between the actions under color of a federal office and the plaintiff's claims." The court was convinced that Avondale met the definition of a person under the statute. Relying on the recent and synonymous ***Templet*** case, the court quickly noted that Federal Officer Removal Statute is not applicable in cases asserting claims of negligence for failure to warn. Avondale argued that the standard was out of date post amendment of § 1442(a)(1). For example, Avondale cited the addition of "relating to" before the "any act under the color of such office warranted a different approach. The court was not persuaded as the precedent upon which the Court relied was post decided 2011. Consequently, the case was remanded to state court.

Valve Manufacturer Granted Summary Judgment as Court Finds No Evidence of Conspiracy

(U.S. District Court, District of Delaware, June 6, 2018)

The plaintiff Marguerite MacQueen filed claims in the Superior Court of Delaware against defendant Crane Co., among others, for manufacturing products that exposed her late husband David MacQueen to asbestos during his time aboard the USS Randolph and USS Independence in the U.S.Navy from 1956 to 1960, and during his time as a salesman for the Union Carbide Corporation from 1963 to 1980. Crane subsequently removed the matter to federal court on federal officer jurisdiction.

Crane moved for summary judgment on the only existing count against it, civil conspiracy. The court recommended granting Crane's motion for two reasons. It first found that the plaintiff's conspiracy count alleged a conspiracy between Metropolitan Life and various defendants, not between Crane and the U.S.Navy, as the plaintiff alleged in her briefs responsive to Crane's summary judgment motion. "A plaintiff cannot raise a claim for the first time at the summary judgment stage if it was not included in the complaint." Secondly, the court determined that the plaintiff failed to present any facts supporting the argument that there was a conspiracy between Crane and the Navy to commit a wrong against Mr. MacQueen. Specifically, the court determined that the documents supporting Crane's removal did not show any nefarious intent on the part of the Navy, nor any direct communication between Crane and the Navy regarding the suppression of warnings.

Read the full decision here.

Turbine Manufacturer's Choice of Law Motion Granted Based on Location of Asbestos Exposure and Diagnosis

(U.S. District Court for the District of Massachusetts, May 9, 2018)

The plaintiff Ruth Burleigh, the widow of the plaintiff's decedent Ernest Burleigh, filed suit in the U.S. District Court for the District of Massachusetts against numerous defendants alleging that decedent developed mesothelioma as a result of exposure to asbestos while working as a mechanic at the Portsmouth Naval Shipyard (the shipyard) from 1960-1981. The shipyard is located in Kittery, Maine, approximately 20 miles from the Massachusetts border. The plaintiff's decedent alleged exposure to asbestos in Maine only, was a resident of Maine for the entirety of his alleged exposure, and was diagnosed in Maine.

Defendant GE filed an answer to the original complaint, asserting that it "adopts the master cross claim (sic) against all defendants," therefore they also asserted a crossclaim for contribution against codefendants as joint tortfeasors with regard to plaintiff's damages. During the life of the litigation, multiple defendants settled, leaving three defendants remaining: GE, Crane Co. ("Crane"), and Warren Pumps, LLC (Warren). GE and the plaintiff stipulated to the fact that GE is a New York Corporation with a principal place of business in Massachusetts. GE designed and manufactured the turbines, and associated asbestos-containing gaskets, in Massachusetts, and shipped them to the shipyard in Maine.

GE filed a motion to apply Maine substantive law, which was joined by Crane and Warren. GE identified various conflicts between Maine and Massachusetts law, including caps on damages and the burden of proof in a wrongful death claim. The plaintiff argued that Massachusetts law should apply to any issues related to the wrongful death claim.

When jurisdiction is based on the federal officer removal statute, a federal court adheres to the forum state's choice of law rules to determine the applicable substantive law. The court looked to the Restatement (Second) of Conflict of Laws, Section 6 for guidance, examining the following factors: 1. the place where the injury occurred; 2. The place where the conduct causing the injury occurred; 3. The domicile, residence, nationality, place of incorporation and place of business of the parties; and 4. The place where the relationship, if any, between the parties is centered.

The court determined that the contacts weighed heavily in favor of Maine. The court further held that "on balance, Massachusetts does not have a more significant relationship than Maine to the occurrence and the parties under the principles in section six with respect to the amount of non-economic compensatory and punitive wrongful death damages; the burden of proof in a wrongful death action; and the standard of conduct required to recover punitive damages in a wrongful death action."

The plaintiff did not address or discuss the joint and several liability issues relative to contribution in their brief, and therefore waived any opposition to applying Maine law for that issue.

Ultimately, the court granted GE's motion to apply Maine law.

Read the full decision here.

Cases Remanded After Court Determines Defendant Shipbuilder Controlled Safety Procedures

(U.S. District Court for the Eastern District of Louisiana, April 11, 2018)

The Eastern District of Louisiana granted motions to remand in two separate mesothelioma cases arising out of alleged exposure to asbestos through work for defendant Avondale Industries, Inc., a shipbuilder for the U.S.Navy. Each plaintiff originally filed their actions in state court, alleging that Avondale failed to warn of the hazards of asbestos and failed to implement proper safety procedures for the handling of asbestos. Avondale removed the matter to federal court on federal officer jurisdiction.

In remanding, the court focused on evidence that the federal government had no control over Avondale's application of safety measures, despite the fact that the government did specify Avondale's use of asbestos in building the ships. The court cited testimony from two Avondale supervisors and a federal ship inspector, who all echoed the notion that the U.S.government played no role in enforcing safety regulations during ship construction, or in ensuring Avondale's compliance with state law obligation to warn of hazards. Stated another way, the plaintiffs' failure to warn and failure to safeguard claims have nothing to do with federal requirements, because safety measures were always controlled by

Avondale. In interpreting the federal officer removal statute, 28 U.S.C. Section 1442, and subsequent case law, the court emphasized that removing parties must establish the "requisite causal connection between {their} actions under color of federal office and the plaintiff's claims." Finding a lack of a causal nexus in these two cases, both were remanded.

Read the full decision here.

Maritime/ Admiralty Law Decisions

Applying Washington Law to Summary Judgment Based on Government Contractor Defense for Pump Manufacturer Results in Denial of Motion

(United States District Court, Western District of Washington, October 9, 2018)

The court ruled on competing motions for summary judgment from the plaintiff Alice Mikelsen and the defendant Warren Pumps in this case involving allegations that Arthur Mikelsen developed mesothelioma from working around Warren Pumps in the machine shop at Puget Sound Naval Shipyard from 1942 to 1980. The plaintiff challenged six of Warren Pumps' affirmative defenses; the court granted five of the six, eliminating the defenses of failure to mitigate, contributory negligence, assumption of risk, sophisticated purchaser, and intervening/superseding cause. The court denied summary judgment on the plaintiff's challenge of Warren's government contractor affirmative defense, finding disputed facts regarding whether the Navy's specifications and regulations precluded Warren from satisfying its state law duty to warn.

Regarding Warren's summary judgment motion based upon the government contractor theory, the court declined to apply maritime law and denied this motion. Under Washington law, Plaintiff demonstrated facts sufficient to demonstrate potential causation, even though there was no testimony that Mr. Mikelsen worked directly with a Warren Pump. The court noted that Warren supplied a significant number of pumps to the Navy, Mikelsen worked in the space where those pumps were present, the pumps were used in a manner that created dust, and Mikelsen was in the range of this dust. The court held that Warren did not show as a matter of law that the Navy had reasonably precise specifications regarding warnings and labeling that precluded Warren from complying with their state law duties.

The order denying the defendants motion for summary judgement can be found here.

The order granting in part the plaintiffs motion for summary judgement can be found here.

Superseding Cause/ State of Art as to Navy's Negligence and Knowledge of Asbestos Barred Against Sealing Technology Defendant

(United States District Court, E.D. Virginia. August 24, 2018)

The plaintiff brought this suit against John Crane Inc. (JCI) alleging Mr. Goodrich developed an asbestos related disease for which Defendant was liable. The plaintiff moved in limine to preclude JCI from presenting evidence of the alleged "knowledge or negligence of the Navy."

JCI argued that any failure to warn was not a substantial factor in causing the plaintiff's injury based on the Navy's negligent control of the plaintiff's work space. Also, JCI took the position that the Navy's intervening negligence superseded that of the defendant's. The plaintiff countered and argued that JCI's position was simply the superseding case doctrine. The Court quickly agreed with the plaintiff. The superseding doctrine under maritime law may shield a defendant from liability where "an intervening force brought about a harm that is different in kind from that which would otherwise have resulted from the actor's negligence according to the court. However, the doctrine is only applicable if the "antecedent negligence is a substantial factor in bringing about the injury." Here, the court noted that the Second Circuit rejected the argument that "the Navy's subsequent failure to protect workers from the hazards of asbestos exposure was a superseding cause of a plaintiff's injury that would absolve a manufacturer from liability", in ***IN re Brooklyn Navy Yard Asbestos Litigation***. JCI relied on ***White v. Johns-Mansville Corp.***, whereby the court noted that the superseding doctrine may asserted by the defendants. However, the court noted that ***White*** did not address whether the defense would have been successful. Moreover, JCI offered no evidence to support such a notion. Applying the summary judgment standard, the court ruled that JCI may present evidence of other exposures to defend against substantial contributing factor but could not present evidence concerning the Navy's own negligence or knowledge of the dangers of asbestos.

Finally, the court reviewed JCI's argument that Navy knowledge was a "critical component" of state of the art. The plaintiff countered that this argument was nothing more than an attempt to argue the sophisticated purchaser defense. The court explained that state of the art evidence helps "shape the duty owed" by presenting of the knowledge known at the time about the dangers of asbestos. JCI's argument sought to show what the Navy knew rather than prove that JCI's products were "designed according to the best methods available at the time." Accordingly, the court ruled such evidence to be inadmissible.

Court Grants Summary Judgment to Some Pump Manufacturers, While Denying it to Others in Maritime Action

(U.S.District Court, Eastern District of Pennsylvania, May 22, 2018)

The court issued rulings on summary judgment motions from the five remaining defendants in this lung cancer case, where the plaintiff Robert Hedrick alleged exposure to asbestos while serving in the U.S.Navy from 1953-1957. the plaintiff claimed that his lung cancer was caused by alleged work with asbestos products in the boiler rooms and engine rooms of four naval vessels. Of the five product manufacturer defendants, the plaintiff only identified one by name at deposition. Instead, he relied on the combination of his testimony, with Navy records and expert testimony from Captain Bruce Woodruff, a former U.S.Navy Engineering Duty Officer to establish causation.

The court applied maritime law because the exposure at issue met both the locality and connection tests, as the "exposure occurred on a vessel on navigable waters," and "had a potentially disruptive impact on maritime commerce" because the defendants at issue manufactured asbestos-containing products for use on vessels. Under maritime law, a plaintiff must show that he or she was exposed to the defendant's product and that the product was a substantial factor in causing the injury. "'(M)inimal exposure' to a defendant's product is not sufficient…Rather, a plaintiff must show 'substantial exposure' in order to allow a reasonable inference – based on more than conjecture – that the defendant's product was a substantial factor in causing the plaintiff's injury."

Although Captain Woodruff attested to the presence of products manufactured by three of the moving defendants on board the ships on which the plaintiff worked, the court concluded that other evidence was insufficient to demonstrate "substantial exposure" without speculation or conjecture and granted summary judgment. The court denied the summary judgment motion of defendant Air & Liquid Systems (Buffalo pumps) given that Woodruff identified their products on board relevant Navy ships, and because the plaintiff testified that he believed that he remembered Buffalo pumps from one ship specifically. Because Woodruff suggested that Crane was the sole supplier of valves to one of the relevant ships, and because the plaintiff testified that valve maintenance was one of his primary duties dominating up to 80 percent of his time, the court denied Crane's summary judgment motion holding that a factfinder could reasonably conclude that Plaintiff regularly worked on Crane valves with this evidence.

Motion to Dismiss Based Upon Lack of Personal Jurisdiction Denied in Maritime Case

(U.S.District Court Eastern District of Louisiana, May 18, 2018)

The plaintiff, Robert Schindler, filed suit against Dravo Basic Materials Company, Inc. (Dravo), to recover for injuries caused by his development of mesothelioma from allegedly being exposed to asbestos while working for three months in 1973 on a ship owned by Dravo. The ship was operated in Lake Pontchartrain during the relevant time period. The plaintiff filed his complaint under maritime law on November 21, 2017. Dravo responded by filing a motion to dismiss based upon a lack of personal jurisdiction.

Dravo argued that the court possessed neither general or specific personal jurisdiction over it. With regard to the former, Dravo argued that it is not a Louisiana corporation and does not maintain a principal place of business in the state. As for specific jurisdiction, Dravo argued that it has not had any contacts with the state for nearly 25 years, and therefore the exercise of personal jurisdiction would be unreasonable.

The plaintiff did not respond to the general jurisdiction argument, so the court focused on the specific jurisdiction argument. The court denied Dravo's contention that temporal limitations should be placed on its assessment of Dravo's minimum contacts with Louisiana in the context of specific jurisdiction. Finding that the plaintiff performed work on Lake Pontchartrain on the ship, the court concluded that Dravo purposely availed itself of the privileges of conducting activities within the state of Louisiana.

The burden then shifted to Dravo to demonstrate the exercise of jurisdiction would be unreasonable. Dravo essentially argued that because it is an inactive company which solely exists in Pennsylvania, and the relevant documents are located there, that it would be unreasonable for the court to exercise jurisdiction over it. The court disagreed, finding that local counsel had been retained and could defend the case that the location of documents did not weigh in favor of transferring the litigation to another jurisdiction and that Louisiana had a greater interest in adjudicating the matter than Pennsylvania. Accordingly, the court denied Dravo's motion to dismiss based upon a lack of personal jurisdiction.

Read the full decision here.

Federal Court Denies Summary Judgment Under Massachusetts Statute of Repose, But Grants Defendants' Motions on Other Grounds

(U.S. District Court for the District of Massachusetts, March 30, 2018)

The plaintiffs allege that the decedent, Wayne Oliver, developed mesothelioma from bystander exposure to asbestos during his work as a pipe inspector on the construction of two power plants in the 1970s. Defendant General Electric Company (GE) specified and produced steam turbine-generators for the power plants, and supervised their installation. Defendant NSTAR, formerly known as Boston Edison Company (NSTAR/BECO), owned one of the power plants during the time of the decedent's work. The decedent worked for non-party Bechtel Corporation, who acted as the owner's architect/engineer, and who specified and procured all construction materials for the projects, with the exception of the GE turbine-generators. Both defendants moved for summary judgment on statute of repose and other grounds. GE's motion was denied on statute of repose grounds, but granted on others. NSTAR/BECO's statute of repose motion was deemed inapplicable, but their summary judgment motion was granted on all other grounds.

Massachusetts' statute of repose, Mass. Gen. Laws ch. 260, Section 2B, puts forth a six-year limit for the commencement of any tort action alleging deficiency or neglect in the "design, planning, construction, or general administration of an improvement." The court acknowledged that the Massachusetts Supreme Judicial Court had not considered the application of Section 2B to asbestos claims before offering its own analysis. The court first recognized that Section 2B didn't define "improvements to real property," but unequivocally expressed its own position that "(t)he nature of the activities enumerated in Section 2B – design, planning, and construction – clearly contemplate the process of improvement as well as the finished product, and thereby reach integral components like asbestos-containing insulation." However, the court declined to apply the statute of repose in this instance, noting that GE had "control of the site at the time of {Decedent's} exposure, conducted regular on-site maintenance and inspections for at least two decades after construction was complete," and was not like the typical, intended beneficiaries of statutes of repose who terminated their connection with a construction site many years in the past. The court went further to state that application of the statute in this instance would lead to absolute immunity, and that it isn't clear that Section 2B was designed to disallow asbestos claims, which have a latency of at least 20 years. The court declined to allow NSTAR/BECO the benefit of the protection of the statute of repose, finding that Section 2B does not limit the liability of an owner of property.

The court applied Maritime law for GE's summary judgment motion as to negligence and breach of warranty for naval exposure arising out of Decedent's work aboard Navy vessels at the Fore River Shipyard in Quincy, Massachusetts, and declined to extend liability for component parts that were not distributed or manufactured by GE. The court also granted GE's motion for summary judgment on Plaintiffs' count for punitive damages, as the Massachusetts wrongful death statute views them as an element of damages, rather than a separate cause of action.

Regarding NSTAR/BECO, the court granted their summary judgment motions on product liability counts, noting that they never manufactured, supplied or sold asbestos-containing products. The court further granted NSTAR/BECO's summary judgment as to the plaintiffs' strict liability count, finding that asbestos work is "not abnormally dangerous where its risks may be mitigated through the exercise of reasonable care," that the use of asbestos was common in the time of the decedent's exposure, and that the balance tips in favor of NSTAR/BECO given the region's energy needs at the time that the power plants were built.

NSTAR/BECO's motions for summary judgment on the plaintiffs' negligence theories received lengthier analysis. In looking at the vicarious liability theory, the court cited the contract between NSTAR/BECO and the decedent's employer Bechtel, and determined that Bechtel controlled the "means, methods, manner, and safety" of the power plant construction. The decedent's own testimony supported the contractual rights of the parties, as he stated that his Bechtel supervisors directed his work, and that NSTAR/BECO never told him how to do his work, nor did their employees do any hands-on work on the site themselves. Regarding the plaintiffs' landowner liability theory, the court concluded that NSTAR/BECO did not have a duty to warn of an unknown hazard, as all parties entered the construction premises with "at least as much knowledge of the presence of asbestos" as NSTAR/BECO.

Read the full decision here.

Other Maritime/ Admiralty Law Decisions

- Bare Metal/ Component Parts
  - **Supreme Court Accepts Review of Bare-Metal Defense Under Maritime Law**
    (U.S. Supreme Court, May 14, 2018)
  - **Motion for Reconsideration Based Upon Change in Law Denied as Untimely**
    (U.S. District Court for the District of Delaware, April 9, 2018)
  - **Boiler Manufacturer's Summary Judgment Reversed; Question of Fact on Product ID *and Denial of Bare Metal Defense***
    (U.S. District Court for the Northern District of California, April 2, 2018)
- Expert Challenges Decisions
  - **Valve Manufacturer Granted Summary Judgment as Court Finds No Evidence of Conspiracy**
    (U.S. District Court, District of Delaware, June 6, 2018)

Motions in Limine Decisions

Testimony of Plaintiff's Key Witness is Inadmissible Hearsay; Court Reverses Judgment in Mesothelioma Claim

(Court of Appeal, First District, Division 5, California, October 26, 2018)

In the matter of Frank C. Hart, he Court of Appeal, First District, Division 5, California reversed a lower court's judgment against defendant after finding the testimony of plaintiff's key witness was inadmissible hearsay.

The plaintiff Frank C. Hart filed suit alleging that his mesothelioma diagnosed was caused by exposure to asbestos from his work in construction as a pipe layer. The paintiff alleged that defendant supplied asbestos-containing piping that exposed him to asbestos. The lower court's judgment was primarily based on a foreman's (Foreman) testimony regarding invoices purporting to show the defendant supplied asbestos-cement pipes to a worksite in McKinleyville, California in the 1970s.

More specifically, Foreman testified he knew Johns-Manville manufactured the piping based on his observation of the stamp on the pipe. Further, Foreman believed the defendant supplied the pipe because he signed invoices as products were delivered to the worksite(s), and he checked the invoices to ensure everything was in order. Foreman testified that he believed the defendant supplied the piping at the relevant worksite where the plaintiff worked. However, Foreman could not recall exactly how defendant's name was written on the invoices or the names of any other suppliers. Foreman had no other basis for believing that defendant supplied piping to this work site.

The court focused in on the fact that Foreman's belief that the defendant supplied the asbestos-cement pipe was based on his review of invoices or delivery tickets only, and found the wording on these invoices or delivery tickets were out of court statements offered to prove the truth of the matter asserted (i.e. that defendant supplied the piping). Thus, the invoices were found to be hearsay.

The court ultimately found that Foreman lacked the personal knowledge of who the supplier really was and ruled his testimony admissible. As such, since there was no other evidence that the defendant supplied piping that the plaintiff worked with or around, the judgment against the defendant was reversed

Court Precludes Some But Not All Testimony of Naval Expert

(United States District Court, E.D., Virginia, September 28, 2018)

Following up with a prior ACT post on the ***Harry Goodrich*** matter pending in the United States District Court, E.D., Virginia, the Court has issued an omnibus opinion concerning motions in limine.

Among other issues decided, the court addressed the plaintiffs' motion to limit the testimony of defendants' naval expert, Margaret McCloskey (McCloskey). Pursuant to Rule 702, the plaintiffs sought to limit the testimony of McCloskey in four (4) respects: (i) as unqualified to opine about plaintiffs actual exposure to asbestos-containing thermal insulation or amosite while serving in the U.S. Navy; (ii) lacks factual basis for opining that the ships that plaintiff served on contained amosite thermal insulation; (iii) should be precluded from using photographs and/or videotapes of Navy vessels and insinuating that the insulation contains asbestos, amosite, etc.; and (iv) should be precluded from presenting speculative estimates of the tonnage of asbestos insulation, amosite, etc. onboard the ships plaintiff served on. The plaintiffs did not generally challenge McCloskey's expertise and specialized knowledge stemming from her education background and 27 year naval career.

Upon review of plaintiffs arguments, the court took into consideration McCloskey's education background and experience and noted McCloskey stated her experience “spans the operation, maintenance, repair, modernization, and construction of all classes of steam and nuclear[-]powered ships and submarines.” McCloskey further asserted familiarity with “plans, designs, specifications, manuals, qualified products lists, departure reports, and other documents used in the construction and repair of [U.S.] Navy ... ships” and with “rate training manuals and correspondence course textbooks.” Here, the court found sufficient factual basis existed for McCloskey to testify about the presence of thermal insulation, lagging, and other products containing asbestos, including amosite asbestos, onboard the ships upon which the plaintiff served. However, the court also found that insufficient facts and data existed to allow McCloskey's testimony to characterize and/or opine about the quantities and/or tonnage of the asbestos-containing thermal insulation (amosite), onboard when Goodrich served, and she is not qualified to testify about the plaintiff's actual exposure to the same.

On the issue the admissibility of photographs and videotapes of insulation in conjunction with McCloskey's testimony, the court punted and advised that issue will be addressed at the final pre-trial conference or at trial.
Thus, the plaintiff's motion in limine to preclude testimony of Margaret McCloskey was GRANTED in part and DENIED in part.

Read the full case decision here.

Superseding Cause/State of Art as to Navy's Negligence and Knowledge of Asbestos Barred Against Sealing Technology Defendant

(United States District Court, E.D. Virginia. August 24, 2018)

The plaintiff brought this suit against John Crane Inc. (JCI) alleging Mr. Goodrich developed an asbestos related disease for which Defendant was liable. The plaintiff moved in limine to preclude JCI from presenting evidence of the alleged "knowledge or negligence of the Navy."

JCI argued that any failure to warn was not a substantial factor in causing the plaintiff's injury based on the Navy's negligent control of the plaintiff's work space. Also, JCI took the position that the Navy's intervening negligence superseded that of the defendant's. The plaintiff countered and argued that JCI's position was simply the superseding case doctrine. The Court quickly agreed with the plaintiff. The superseding doctrine under maritime law may shield a defendant from liability where "an intervening force brought about a harm that is different in kind from that which would otherwise have resulted from the actor's negligence according to the court. However, the doctrine is only applicable if the "antecedent negligence is a substantial factor in bringing about the injury." Here, the court noted that the Second Circuit rejected the argument that "the Navy's subsequent failure to protect workers from the hazards of asbestos exposure was a superseding cause of a plaintiff's injury that would absolve a manufacturer from liability", in ***IN re Brooklyn Navy Yard Asbestos Litigation***. JCI relied on ***White v. Johns-Mansville Corp.***, whereby the court noted that the superseding doctrine may asserted by the defendants. However, the court noted that ***White*** did not address whether the defense would have been successful. Moreover, JCI offered no evidence to support such a notion. Applying the summary judgment standard, the court ruled that JCI may present evidence of other exposures to defend against substantial contributing factor but could not present evidence concerning the Navy's own negligence or knowledge of the dangers of asbestos.

Finally, the court reviewed JCI's argument that Navy knowledge was a "critical component" of state of the art. The plaintiff countered that this argument was nothing more than an attempt to argue the sophisticated purchaser defense. The court explained that state of the art evidence helps "shape the duty owed" by presenting of the knowledge known at the time about the dangers of asbestos. JCI's argument sought to show what the Navy knew rather than prove that JCI's products were "designed according to the best methods available at the time." Accordingly, the court ruled such evidence to be inadmissible.

Frustrated Court Denies Plaintiffs' Motion to Reconsider Exclusion of Kenneth Garza Due to Lack of Authority

(U.S. District Court for the Eastern District of Wisconsin, May 2, 2018)

In this case set for trial on June 4, 2018, the plaintiffs filed eleven motions under ***Daubert v. Merrell Dow Pharmaceuticals, Inc.,*** 509 U.S. 579 (1993) and various motions in limine. After hearing and argument, the court granted defendant Pabst Brewing Company's motion to bar, under ***Daubert***, Kenneth Garza's reports, opinions, and testimony, and granted the ***Daubert*** motion of defendants Sprinkmann, Employers Insurance Company and WEPCO's to exclude Garza's testimony. The court found that although Garza's training and background gave him the knowledge and expertise to qualify as an expert in the area of industrial hygiene, the plaintiffs had not demonstrated that his methods were reliable, especially since his general report contained nothing specific to the facts of this case. The plaintiffs filed a motion to reconsider, which the court denied.

The plaintiffs based their motion to reconsider on: (1) the ***Daubert*** factors; (2) Garza's facts, data, and assumptions; (3) Garza's new declaration attached as Exhibit 1 to the motion for reconsideration; (4) 296 pages of testimony from a ***Daubert*** hearing (involving Garza) in an unrelated Milwaukee County Circuit Court case; and (5) the absence of a ***Daubert*** challenge in the defense motions to certain opinions or report statements of Garza. The court noted: "Noticeably absent from the plaintiffs' motion is any reference to a rule authorizing the motion to reconsider, or to the standard for reviewing such motions."

While the Federal Rules of Civil Procedure did not expressly recognize a motion to reconsider, the court discussed various other federal rules and case law in seeking authority allowing for this motion. Specifically, Rule 54(b) allowed a court to review non-final orders, but as noted by several courts, motions to reconsider "'are viewed with disfavor…'". Motions to reconsider may address newly discovered evidence. However, the plaintiffs did not argue that any of the 37 exhibits attached to their motion or any of the three exhibits filed as supplemental authority constituted newly discovered evidence. "Rather, after over eight years of litigation and a scant four months before trial, the plaintiffs have filed a bevy of exhibits that are newly ***created*** or newly produced, but decidedly are not newly ***discovered***." The court summarized the lengthy steps taken in litigation. In filing these documents after the hearing, "…the plaintiffs have followed a disturbing pattern that has emerged over the course of the litigation in the consolidated cases—a practice of filing, amending or supplementing pleadings or documents after deadlines have expired, one that has contributed to the procedural quagmire of this litigation."

The plaintiffs did not argue that the district court's decision to bar Garza's testimony constituted a wholesale disregard of controlling precedent. While the plaintiffs argued that the court's conclusion that Garza's methodology was unreliable, nothing in the plaintiffs' hundreds of pages of reconsideration material demonstrated a manifest error of fact or law. In contrast, neither Garza's reports nor his deposition testimony provided any basis for the court or the defendants to assess his methodology for reliability.

The district court also analyzed the plaintiffs' motion for reconsideration under the "law of the case" exception, which authorized reconsideration if there was a compelling reason, such as a change in the law that makes clear that the earlier ruling was erroneous. Here there was no change or clarification in the law, and the plaintiffs did not argue that the court's decisions were clearly erroneous. The court also rejected the plaintiffs' arguments that they should be allowed to present certain of the conclusions/opinions Garza stated in an "amended" report on the sole basis that the defendants did not specifically challenge those opinions/conclusions.

Read the full decision here.

Other Motions in Limine Decisions

- Expert Challenges
  - **Frustrated Court Denies Plaintiffs' Motion to Reconsider Exclusion of Kenneth Garza Due to Lack of Authority**
    (U.S. District Court for the Eastern District of Wisconsin, May 2, 2018)

Pleadings Challenge Decisions

Third Party Distribution of Talc Products in Florida Ruled Insufficient to Confer Personal Jurisdiction Over Talc Supplier

(Fourth District Court of Appeal of Florida, December 19, 2018)

A divided Florida Appellate Court granted a motion to dismiss based on a lack of personal jurisdiction over a cosmetic talc supplier, Imerys Talc America, (Imerys). ***See Imerys Talc Am., Inc. v. Ricketts***, No. 4D17-3815, 2018 WL 6719406 (Fla. Dist. Ct. App. Dec. 19, 2018). In opposition to the motion, Plaintiff argued that under the stream-of-commerce doctrine Imerys was subject to specific personal jurisdiction based on its out-of-state sales to a downstream manufacturer, who later distributed their talc containing cosmetic products in the State of Florida. The plaintiff further alleged that Imerys both knew and had intended that its talc supplies would be incorporated in products destined for distribution in Florida. In a 2-1 decision the Fourth District Court granted Imerys a dismissal as it "directed no action or activities in Florida." ***Id***. at *3. In her dissenting opinion, Justice Carole Taylor explained that Supreme Court precedent was not in conflict with Florida authority finding personal jurisdiction over an upstream supplier where the supplier is aware of third party distribution and marketing of the finished product in the forum state.

You can read the full decision here

Set Aside of Default Judgment Against Insurer Affirmed on Grounds of Equity

(Court of Appeal, First District, Division 5, California, December 11, 2018)

Several plaintiffs consolidated suit against multiple defendants including Associated Insulation of California (Associated) alleging exposure to asbestos for which the defendants were liable. Associated did not file a response to the complaint. Accordingly, the plaintiffs moved for default judgments in 2013 and again in 2015. The default judgments varied in amounts from $350,000 to $1,960,458. A notice of default had been served upon Associated but not its insurer, Fireman's Fund (Fireman). Fireman shortly thereafter located policies indicating potential coverage and moved to set aside the default judgments on grounds of "extrinsic mistake". The plaintiffs opposed Fireman's request for equity. The trial court granted Fireman's motion on the grounds of extrinsic relief.

The court started of its analysis by setting the standard for vacating a default judgment on equitable grounds. One ground includes extrinsic mistake "a term broadly applied when circumstances extrinsic to the litigation have unfairly cost a party a hearing on the merits." To establish the right to equitable relief under extrinsic mistake, a party must establish 1) a meritorious case 2) a satisfactory excuse for not presenting a defense to the original action and 3) a diligence in seeking to set aside the default once the fraud or mistake has been discovered." The court quickly concluded that the trial court had not abused its discretion by granting the motion to set aside. Here, the court noted that Fireman and Associated had not defended the suit and that the allegations of exposure occurred years ago. Moreover, the default judgments were in excess of a million dollars without the plaintiff having established the plaintiff's injuries. The plaintiffs took the position that Fireman had not attached anything to its pleadings to assert a meritorious defense. Case law was cited by the plaintiff for this proposition which the court rejected. On the other hand, Fireman gave a satisfactory reason for why it had not presented a defense and established diligence in attempting to set aside the judgment once it had been ascertained. Accordingly, the court was convinced of the exceptional circumstances creating the need for a set aside. Consequently, the set aside was affirmed.

Market-Share Cause of Action Against Automotive Parts Manufacturer Dismissed Without Prejudice to Amend Complaint

(United States District Court, For the Northern District of California. December 6, 2018)

The laintiff Gary Farris, brought suit against multiple product manufacturers and distributors alleging that his diagnoses of lung cancer and asbestosis were causally related to asbestos exposure he sustained while 1) working on brakes and clutches in an automotive shop during the summers from 1960 to 1964 and shadetree automotive repairs from the 1960s to 1980s; 2) serving in the United States Navy from 1964 to 1967; and 3) servicing photocopiers from 1967 to 1989. In support of his claims, Farris raised a fifth cause of action for market-share liability, alleging that his injuries from “asbestos-containing motor vehicle friction products that are and were fungible in color, size, shape, texture and function, [and that] said products were indistinct and similar in appearance and composition, and through no fault of the plaintiff these products cannot be traced to a particular defendant or other entity.” He argued that as a result, the named friction product defendants were liable to him in proportion to their respective share of the friction product market. Plaintiff further pled his reliance on Wheeler v. Raybestos-Manhattan, 8 Cal. App. 4th 1152 (1992), which allowed such claims to proceed in a prior case involving asbestos containing brake products.

Defendant Honeywell International, Inc. moved to dismiss the market-share cause of action, by arguing that the Wheeler decision had been implicitly overruled by the California Supreme Court's later decision in Rutherford v. Owens-Illinois, Inc., 16 Cal. 4th 953 (1997). In his ruling, District Court Judge Jon S. Tigar, wrote that while the court agreed with Honeywell's contention that Rutherford cast doubt on the continued viability of Wheeler, he was bound to " follow Wheeler in the absence of convincing evidence that the California Supreme Court would rule differently." However, the court still dismissed the market-share cause of action on the alternative ground that "[p[laintiffs' description of 'asbestos-containing motor vehicle friction products' as the source of Mr. Farris's injuries does not identify the goods at issue with sufficient specificity to plausibly assert fungibility, as required to make out a market-share liability claim." The court did however provide the plaintiffs 30 days to amend their complaint in order to reinstate the market-share cause of action.

In-State Product Distribution Ruled Insufficient to Confer Personal Jurisdiction over Out-Of-State Asbestos Product Manufacturer

(Florida Third District Court of Appeal, November 21, 2018)

The plaintiffs, Silverio and Faye Onorato, brought suit against numerous asbestos manufacturers and distributors alleging that Mr. Onorato developed mesothelioma from his exposure to asbestos, which occurred entirely in the State of Florida. The defendant, Highland Stucco and Lime Products, Inc.,(Highland) moved to dismiss the plaintiffs' claims by arguing that there was no personal jurisdiction over it, as its manufacturing business operations were confined to Southern California. In support of its motion, Highland annexed an affidavit of its president who alleged a complete lack of connection with the forum state. In response, the plaintiffs directed the court to trade journal references to an in-state distributor known as Highland Stucco and Lime Products of Florida, Inc. In reply, defendant Highland averred that Florida based distributor had been dissolved approximately 8 years prior to the plaintiff's first claimed exposure. The trial court held that the plaintiff's allegations of in-state exposure, in combination with the existence of a Florida based distributor were sufficient to confer personal jurisdiction over Highland.

Last week, an Appellate District Court reversed the decision by finding that the plaintiffs had failed to demonstrate a connection between the corporate entities. Moreover the court held that "even if the plaintiffs had established that the Florida entity was a subsidiary of Highland, the mere presence of a subsidiary in Florida, without more, is insufficient to subject a non-Florida corporate parent to Florida's long-arm jurisdiction." ***Highland Stucco & Lime Prod., Inc. v. Silverio Onorato & Faye Onorato***, 2018 WL 6132263, at *4 (Fla. Dist. Ct. App. Nov. 21, 2018) The court further grounded their rationale for dismissal based on the fact that the plaintiffs had failed to demonstrate that a finding of personal jurisdiction over Highland did not violate constitutional minimum protections for due process. The court explained that the plaintiffs "failed to satisfy their burden by presenting evidence as to how Highland's product(s) may have made their way to Florida and in what quantity, or that Highland directed its product into Florida for distribution." ***Id***. at *5

Brake Manufacturer Obtains Dismissal on Alternative Theories of Liability in Lieu of Product Identification & Proximate Cause

(Mississippi Southern District Court, November 1, 2018)

The plaintiffs William Dickens and Karla Dickens (plaintiffs) allege that the plaintiff William Dickens's (Mr. Dickens) mesothelioma was caused by exposure to asbestos within products he used while employed as a mechanic, and within talcum powder products he used. Ford Motor Company (Ford) was named as one of the defendants since it, "designed its braking systems for asbestos-containing brake linings such that no other material could be utilized as brake linings in those systems." Ford moved to dismiss, under Rule 12(b)(6): (i) the cause of action imputing to Ford liability under the doctrines of enterprise liability, market-share liability, concert of action, and alternative liability; and (ii) the cause of action asserting fraud-based claims, including concealment, conspiracy, aiding, and abetting. The Southern District of Mississippi granted Ford's motion.

First, the court agreed with Ford that none of the doctrines on which the plaintiffs partially based Ford's liability – enterprise liability, market-share liability, concert of action, or alternative liability – have been recognized in Mississippi as relieving a plaintiff of his or her burden to prove product identification and proximate cause. Rather, in Mississippi asbestos cases, the "frequency, regularity, and proximity test is the proper standard in determining exposure and proximate cause," in addition to specific product identification. Accordingly, the Southern District dismissed the cause of action asserting the aforementioned doctrines.

The court also dismissed the cause of action asserting certain fraud-based claims, alleging concealment, conspiracy, and general fraud, on the basis that the plaintiffs failed to plead them with particularity, under both the Mississippi and Federal Rules of Civil Procedure. Specifically, the allegations only referred to undefined "defendants," "conspirators," or non-parties as having engaged in a fraudulent conspiracy to withhold information concerning the dangers of asbestos. This cause of action did not name Ford as a specific participant in these fraud-based activities, nor did it

include specifics with regard to dates, times, parties, locations, or content of allegedly fraudulent communications. Accordingly, the court dismissed this cause of action on the basis that it did not meet the specificity requirements of the Rules of Civil Procedure.

The court further concluded that the claim alleging Ford "aided and abetted" a civil conspiracy claim, also asserted within the fraud-based cause of action, could also be dismissed for failure to state a claim. The court explained that, although, contrary to Ford's argument that Mississippi does not recognize any "aiding and abetting claim," Mississippi does, in fact, recognize such a claim under the Restatement (Second) of Torts § 876(b). However, a plaintiff was still required to prove defendant had knowledge of the conduct constituting the civil conspiracy and substantial assistance or encouragement to the conspiring party in furtherance of the conspiracy. In this case, the court found that the plaintiffs' allegation only asserted that Ford's action was consistent with an alleged conspiracy to use asbestos despise health dangers, but fell short of asserting that Ford knew about conduct constituting a conspiracy regarding asbestos, or that it took action to encourage others to carry out a conspiracy.

Read the full case decision here.

Court Partially Denies Talc Manufacturer's Motion to Dismiss as to Plausible Gross Negligence and Punitive Damages Claims, but Grants Motion as to Speculative Conspiracy Claim

(U.S. District Court North Carolina, M.D., October 18, 2018)

The plaintiffs Everett VanHoy and Lucille VanHoy (plaintiffs) filed this personal-injury action against multiple defendants, including American International Industries (AII), alleging the plaintiff Everett VanHoy's (Mr. VanHoy) mesothelioma was caused by his exposure to a variety of asbestos-containing products throughout his life. AII moved to dismiss, under Rule 12(b)(6), the plaintiffs' complaint on the following bases: (i) failure to state a gross-negligence claim; (ii) the plaintiffs' inability to recover punitive damages resulting from a failure prove AII acted with "fraud, malice, or with willful and wanton conduct"; and (iii) the plaintiffs' failure to sufficiently assert a claim for civil conspiracy. The Middle District of North Carolina granted in part and dismissed in part AII's motion.

First, the court concluded that the gross-negligence claim was "plausible," the characterization of which is the relevant inquiry upon a Rule 12(b)(6) motion for failure to state a claim, reasoning that the complaint contained enough factual information regarding "when, where, and how Mr. VanHoy was exposed to asbestos," and a list of the products at issue, all of which would enable AII to prepare a response. Next, the court found the plaintiffs' list of specific acts and omissions by AII's management supported the conclusion that the complaint plausibly alleged that "AII's management engaged in willful or wanton conduct sufficient to state a claim for punitive damages."

The court, however, found that the plaintiffs failed to establish a conspiracy claim beyond suspicion or mere conjecture. Since the plaintiffs failed to provide details as to what "aid" was given by the defendant Metropolitan Life Insurance Company to AII or how Defendants "collaborated" to understate the dangers of asbestos exposure, the Middle District concluded that the plaintiffs alleged no facts from which it could be reasonably inferred that there was an agreement between AII and the defendant Metropolitan Life Insurance Company amounting to civil conspiracy.
Accordingly, the court denied AII's Rule 12(b)(6) motion with respect to the plaintiffs' gross-negligence claim, and granted AII's Rule (12)(b)(6) motion with respect to the plaintiffs' civil-conspiracy claim.

Read the full case decision here.

Defendant Survives Dismissal of its Claims for Contribution and Indemnification

(Superior Court of the Virgin Islands, Division of St. Croix. September 28, 2018)

Litwin Corporation (Litwin) filed suit against General Engineering Corporation (GEC) seeking contribution and indemnification related to over a hundred asbestos suits filed against Litwin in the United States Virgin Islands. Prior to suit, Litwin settled with the claimants. Litwin then sought contribution and indemnification to mitigate its settlement costs. GEC moved to dismiss the complaint and Litwin responded in opposition.

The case was reassigned because of its similarity with the claims pending with a case known as ***In re: Kelvin Manboth Asbestos Litigation*** (Manboth).

The plaintiff, Litwin, alleged that was entitled to recovery against GEC as successor in interest to Reed, Wible and Brown, Inc. for "performing services in the refinery which exposed others to catalyst, asbestos…" Specifically, Litwin

believed GEC should indemnify it because GEC's actions were the basis for claimants' suits against Litwin. On the other hand, GEC argued that the complaint was vague and did not rise to the level required to sustain the allegations. GEC also pointed out that Litwin had similar claims pending in the Manboth litigation which equally failed to state claims.

The court noted that Litwin's opposition assumed arguments made by GEC that had not been made. According to the court, Litwin addressed issues in its reply that perhaps were made by GEC in the ***Manboth*** litigation but that were not present in the instant motion. However, what was dispositive in the instant matter was the fact that GEC relied upon cases that did not involve contribution and indemnity according to the court. The court therefore denied GEC's motion to dismiss.

Plaintiff's Failure to Establish Minimum Contacts Leads to Dismissal for Lack of Personal Jurisdiction

(District Court of Appeal of Florida, Fourth District. August 08, 2018)

The plaintiff alleged he was exposed to products manufactured by the defendant or its predecessor from 1975-1977 in Florida. The defendant submitted an affidavit confirming it had no contacts in Florida before 1994. However, its predecessor ran an operations plant in Florida in the early 1980's, after the alleged exposure. The plaintiff put forth no evidence of minimum contacts other than the allegation of use of defendant's products in the 1970's according to the Court. Relying on ***Southern Wall Products***, the Court found that Plaintiff had not satisfied "the constitutional minimum contacts" for the Court to assert jurisdiction in Florida.

Read the full case decision here.

Transfer Granted Where Severance of John Doe Defendants Aids Judicial

(United States District Court, D. New Jersey. August 07, 2018)

The United States District Court issued a Show Cause Order requiring the parties to show why this matter should not be transferred to the District of Delaware. The plaintiff opposed the transfer arguing that two of the defendants also known as "John Doe" defendants may not be subject to personal jurisdiction in Delaware. The defendants countered and argued that the plaintiff's claims against those two defendants, RBC Sonic and Aetna Steel Products Corporation, could easily be severed. The court agreed that claims against the John Doe defendants could be transferred under ***D'Jamoos***. The court also noted that transfer would aid in judicial economy because the arguments as to jurisdiction over the remaining eight defendants would be moot. Finally, the court stated that transfer was proper under the ***Jumara*** factors because the plaintiff's allegations of exposure in New Jersey was from almost 60 years ago. Here, 7 out of 9 treating physicians were located in Delaware. Moreover, the plaintiff's residence, not defedent's, was more "pertinent" as to when the complaint was filed. Accordingly, the matter was transferred to the United States District Court for Delaware.

Read the full case decision here.

Defendants' Knowledge of Asbestos Not Required to Survive Motion to Dismiss

(U.S. District Court, District of Montana, July 27, 2018)

The United States District Court, District of Montana, issued identical decisions in three with the following similarly situated plaintiffs (collectively as "plaintiffs") and defendant BNSF Railway Company (BNSF):

Lloyd E. Underwood (CV-17-83-GF-BMM-JTJ);
Carrie Sue Murphy-Fauth (CV-17-79-GF-BMM-JTJ);
Consuela Deason, as Personal Representative for the ***Estate of James E. Deason*** (CV-17-76-GF-BMM-JTJ).

In each case, BNSF filed a motion to dismiss for failure to state a claim (among other arguments). Here, BNSF argued that the plaintiffs failed to allege that BNSF owed the plaintiffs a duty of care, and therefore, could not establish the first element of a negligence claim. BNSF noted that the plaintiff's Complaint acknowledged that BNSF did not have proper notice that the relevant product contained asbestos, and even if they did have notice of asbestos contamination, there were no allegations in the complaint that BNSF could foresee that the asbestos could have led to the claims that the plaintiff advanced. In other words, BNSF contended that no legal duty existed.

In issuing this decision, the court emphasized that, in determining a motion to dismiss at this juncture in the case, the Court must accept the allegations in the Complaint as true. After citing to several paragraphs in the plaintiffs' complaint,

if accepted as true, the court found BNSF had fair notice of what the claim was and the grounds upon which it rests. The court further confirmed that (i) whether BNSF actually knew or should have known of the danger of asbestos and vermiculite proves irrelevant and (ii) whether plaintiffs would ultimately succeed in their negligence claim did not matter at the current juncture of the case. Thus, the plaintiffs have sufficiently pled a claim of negligence against BNSF and the motion was denied.

Copies of each of the three referenced decisions are attached.

Plaintiff's Failure to Assert Elements for Fraudulent Misrepresentation Leads to Dismissal for Friction Defendants

(U.S. District Court, M.D. North Carolina, July 23, 2018)

The plaintiff filed suit against 62 defendants including Ford Motor (Ford) and Hennessey Industries (Hennessey) alleging he was injured as a result of exposure to the defendant's asbestos containing products or equipment. Ford and Hennessey moved to dismiss the plaintiff's claims for fraud and fraudulent misrepresentation arguing that the plaintiff failed to state a claim with respect to those allegations. The plaintiff sought leave to amend his complaint and amended the complaint after the court permitted a more definite statement. Ford and Hennessy renewed their motions.

Out the outset, the court noted that it would grant a motion to dismiss on failure to state a claim when "the complaint does not contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Additionally, the plaintiff is required to plead claims of fraud with particularity. Here, the plaintiff's claim for fraud alleged that "defendants falsely represented facts, including the dangers of asbestos exposure, to the plaintiff." Once the more definite statement was filed, the plaintiff included that Ford knew of the dangers associated with asbestos exposure and that such exposure caused mesothelioma. As to Hennessey, the plaintiff alleged that Hennessey was aware of the dangers associated with its grinder equipment but failed to warn the end user. The plaintiff argued that under the ***Breeden*** case, the defendants had a duty to disclose defects where an "at arms-length transaction had occurred." The court quickly concluded that the allegations did not rise to the level of "an affirmative claim for fraudulent misrepresentation." The court found that there was no "at arms-length" transaction or fiduciary relationship between the defendants with the plaintiff. Specifically the ***Burnett*** matter had previously determined that no such relationship between an asbestos manufacturer and the "plaintiff whose work involved the use of asbestos containing products" existed.

Consequently, the renewed motions to dismiss were recommended to be granted.

Read the full case decision here.

Talcum Powder Defendant's Motion to Dismiss Granted on Civil Conspiracy; Denied as to Punitive Damages

(U.S. District Court for the Middle District of North Carolina, June 7, 2018)

American International Industries (AII) was sued by plaintiff Lloyd Bell. The plaintiff claimed his decedent had developed mesothelioma from her use of talcum powder during her work as a hairdresser and her education during beauty school. AII moved to dismiss the plaintiff's claims for willful and wanton conduct, malice, conspiracy, and punitive damages. The court began its review with the standard for a motion to dismiss. According to the court, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." However, speculation and conclusory allegations do not meet the level required to survive a motion to dismiss. AII took the position that the plaintiff had failed to state a claim for both punitive damages and civil conspiracy. On the other hand, the plaintiff argued that AII's motion as to failure to state a claim was untimely since the case started in state court in 2015 and was not raised by AII at that time. The plaintiff relied on the ***Jaeger*** and ***Northstar*** decisions for this proposition.

The court was not persuaded by this argument as both ***Jaeger*** and ***Northstar*** were cases already pending in the District Court whereas the instant state court action was ultimately dismissed with prejudice on grounds of forum non conveniens. The plaintiff then filed his complaint in federal court. Therefore, AII's motion was not untimely. As for punitive damages, AII argued that the plaintiff failed to state a claim under North Carolina law. The court reminded that punitive damages under North Carolina law may be found if there are "compensatory damages and an aggravating factor of fraud, malice, or willful and wanton conduct" in conjunction with the injury. AII also took the position that whether it was grossly negligent was irrelevant in the analysis. The court acknowledged that gross negligence and willful and wanton conduct were used interchangeably at times to describe a place between negligence and intentional conduct. Relying on the recent ***Justice*** matter, the court pointed out that the "distinction between gross negligence and willful and wanton conduct is that gross negligence is done with a disregard for the rights and safety of others whereas

an act that is willful is done with "set purpose." Specifically, "gross negligence only requires the willful act, and not necessarily the willful injury. Therefore, a willful or wanton act rises above an act of gross negligence. Accordingly, the question before the court was whether the plaintiff "plausibly pled" that AII "consciously and intentionally disregarded the rights and safety of others." After going through the complaint line by line, the court concluded that the complaint illustrated not only allegations sufficient to survive the motion but also how AII allegedly ignored advice regarding the hazards of asbestos. The court denied AII's motion to dismiss as to punitive damages.

Moving to AII's motion to dismiss the plaintiff's claim for civil conspiracy, AII argued that the complaint only generally alleged that the defendants had conspired. The court quickly agreed and noted that the complaint was vague with respect to the civil conspiracy claims. The plaintiff sought leave to amend his complaint to address the civil conspiracy count. The court declined, as at this stage, the defendants would be prejudiced should the court grant the plaintiff's motion to amend the complaint.

Read the full decision here.

Lack of Personal Jurisdiction Over Defendant Leads to Remand and Dismissal

(Appellate Court of Illinois, First District, Sixth Division. May 18, 2018)

The plaintiff brought this action against General Electric (GE) arguing that he developed mesothelioma from exposure during his work at various locations for Republic Steel from 1961-1999. According to the plaintiff, the work took place in Illinois, Alabama, Louisiana, and Texas. The plaintiff, a resident of Alabama, filed suit in Illinois. GE moved to dismiss the matter for lack of personal jurisdiction. Specifically, GE argued that the plaintiff's complaint lacked facts establishing personal jurisdiction through Illinois' long-arm statute. Moreover, GE took the position that it had not consented to general personal jurisdiction and the plaintiff had not claimed that he was exposed to GE products in Illinois. Therefore, the plaintiff lacked specific personal jurisdiction according to GE. The trial court denied GE's motion without "identifying" a basis for finding personal jurisdiction.

On appeal, the plaintiff contended that the court had personal jurisdiction over GE because of the "large amount" of business undertaken by GE in Illinois. GE countered and stated that the amount of business it conducts in Illinois pales in comparison to its overall business footprint. Relying on the principle set forth in Aspen, the court found that GE was not "at home" in Illinois. GE's place of business was New York. It employed 330,000 workers world-wide yet only 3,000 in Illinois. Accordingly, there was no general personal jurisdiction over GE. The court also rejected the notion that GE had consented to jurisdiction if it had consented in previous matters. As for specific jurisdiction, the court noted that it exists when "there is an affiliation between the forum and underlying controversy., i.e., some activity or occurrence that takes place in the forum state…" Here, the plaintiff asserted that GE made electric furnaces used by Republic Steel. GE countered with an affidavit of its manufacturing supervisor that it had never made electric furnaces. Moreover, GE argued that the plaintiff's own testimony illustrated his lack of personal knowledge as to who made the furnaces at Republic Steel. The court agreed and noted that the plaintiff equivocated by first denying knowing who made the furnaces and then stating that GE made the furnaces because his brother "worked on furnaces." Specific personal jurisdiction was not established because of his lack of personal knowledge. Finally, the plaintiff argued that jurisdiction was appropriate under the doctrine of "jurisdiction by necessity." The court disagreed as that doctrine has not been adopted by the court. Consequently, the case was remanded with instructions to dismiss GE.

Read the full decision here.

Community Exposure Claims by Former Employees Not Barred by Wisconsin Workers' Compensation Act

(U.S. District Court for the Western District of Wisconsin, April 17, 2018)

Two deceased Weyerhauser employees brought claims against their former employer for common law negligence, negligent nuisance, and intentional nuisance. In an effort to avoid the exclusivity provisions of Wisconsin's Workers' Compensation Act (WCA), both plaintiffs alleged that the defendant Weyerhauser's activities exposed them to asbestos in the community, not during the course of their employment with the defendant, causing their mesothelioma. Weyerhauser challenged the pleadings on several bases, and the court granted and denied their motion in part.

The court denied Weyerhauser's motion to dismiss based on exclusivity of the WCA. Weyerhauser argued that the plaintiffs' exposure to asbestos still arose out of their employment, and that prior authority supported the bar of these types of community claims. The court was unpersuaded, finding that prior decisions both within and outside the jurisdiction were not binding and inapplicable. The court expressed skepticism that plaintiffs could "prove {a} causal

link, or that a reasonable jury could allocate separate damages to that community exposure," but concluded that community claims were permissible under the WCA.

The court dismissed the plaintiffs' public nuisance claims after Weyerhauser's statute of limitations challenge. The court noted that any concerns that the public had regarding rights to clean air ended when Weyerhauser ceased using asbestos in 1979. And, "the claimed injury – mesothelioma—did not arise until decades after the alleged nuisance, further proving that a nuisance claim…is ill-fitted to the facts at issue in these cases." The court also granted Weyerhauser's unopposed motion to bar plaintiff from relying on the Clean Air Act to prove negligent conduct. It denied Weyerhauser's motion to dismiss punitive damages, finding that plaintiffs sufficiently alleged that Weyerhauser acted with intentional disregard in allegedly emitting asbestos into the ambient community air. Finally, the court stated that the exposition of facts in the litigation would create a better record for it to evaluate public policy arguments, and denied Weyerhauser's motion to dismiss negligence claims on public policy grounds.

Read the full decision here.

Plaintiff Survives Motion to Dismiss Upon Adding Additional Allegations in Amended Complaint

(U.S. District Court for the Western District of Wisconsin, April 17, 2018)

The plaintiff filed suit against Weyerhauser and its insurer for alleged emissions of asbestos into the Marshfield, Wisconsin community. Plaintiff Michael Kappel moved to add additional allegations to his complaint. Weyerhauser moved to dismiss. The plaintiffs were substituted upon Mr. Kappel's passing.

Weyerhauser sought dismissal on two separate grounds. First, the defendant argued the plaintiffs did not allege Mr. Kappel's exposure from work at Weyerhauser in an effort to circumvent the exclusivity rules in the local worker's compensation statute. The court disagreed as the complaint alleged exposure from "community or environmental" exposure only. Relying on its previous decisions in the ***Kilty/Spatz*** cases, the court noted the plaintiffs were not required to allege exposure from employment. Moreover, Mr. Kappel did not work at Weyerhauser during the time of the alleged environmental exposure according to the court. Finally, the defendant took the position that dismissal was appropriate since the plaintiff had not alleged a specific disease or date of diagnosis. The court was not persuaded by this argument as the plaintiff's amended complaint corrected those two issues. The court granted dismissal of the nuisance claims. However, the motion to dismiss as to negligence was ultimately denied.

Read the full decision here.

Personal Jurisdiction Motion Denied as Court Focuses on State-Related Contact

(U.S. District Court for the Western District of Washington, March 28, 2018)

Decedent Donald Varney alleged that he developed mesothelioma from ambient exposure to defendants' products while working in various positions at Puget Sound Naval Shipyard in Bremerton, WA, and at Hunters Point Naval Shipyard in San Francisco, CA. Defendants Taco, Inc. and Aurora Pump Company filed identical Motions to Strike and Motions to Dismiss, which the court denied.

The defendants' Motion to Strike pre-judgment interest argued that Washington law made prejudgment interest unavailable for claims of unliquidated damages, and that the plaintiffs' damages were unliquidated because they could not be determined before a verdict. The court found that the plaintiffs' requests were in line with Washington law, and that awardable interest could accrue from the date of a jury verdict, through appeal and remand, until final judgment. The court further clarified that its order denying the motion was silent as to whether any damages were liquidated or unliquidated, or whether the plaintiffs were entitled to interest allowable at law.

The defendants' Motion to Dismiss challenged the pleadings as failing to state a claim, as lacking standing, and on a personal jurisdiction basis. The court summarily denied the motion regarding failure to state a claim, finding that the complaint gave sufficient notice of the what, where, when, and how of the exposure. Regarding standing arguments, the defendants argued that a personal representative had not yet been appointed following the decedent's passing. In denying the motion without prejudice, the court acknowledged that the plaintiffs were still within their allotted time to appoint representatives and substitute them for the decedent, and noted the plaintiffs' counsel's representation that they would timely comply.

The court began its analysis of the defendants' personal jurisdiction arguments by noting that Washington's long-arm statute was "coextensive with federal due process requirements," making the jurisdictional analysis under state and federal law the same. The defendants only challenged specific jurisdiction. Specifically, in their reply, the defendants argued in their Reply that the pleadings were unclear as to whether the decedent's illness arose out of work with their respective products in Washington only, in California only, or in both states. In denying this motion, the court noted that this argument "mistakenly focuses on the plaintiff D. Varney's injury rather than on the defendants' Washington-related conduct. Personal jurisdiction jurisprudence focuses on whether the defendant {emphasis original} has sufficient contacts with the sovereign.'"

Read the full decision here.

Remand/ Removal Decisions

Ninth Circuit Reverses District Court's Decision to Remand

(Ninth Circuit Court of Appeals, December 10, 2018)

Westinghouse appealed the decision of the District Court for the Central District of California, which remanded the matter due to the lack of a colorable federal defense.The district court concluded that the asbestos insulation in a nuclear propulsion system was not military equipment and therefore Westinghouse failed to present a colorable military contractor defense. The district court found that Westinghouse had met the other elements required for federal officer removal. The Ninth Circuit noted that several of its cases framed the issue more broadly, such that the focus was on the whole product provided by the supplier. Thus the evidence supported at least a colorable argument that the military "approved reasonably precise specifications" for the equipment at issue. The Ninth Circuit therefore found that Westinghouse satisfied its burden to show a causal nexus between plaintiffs' claims and the actions it took pursuant to a federal officer's direction. Accordingly, the decision was reversed and remanded.

Lack of Successor Liability Leads to Grant of Summary Judgment for Shipping Defendant

(United States District Court, W.D. Washington. October 25, 2018)

The plaintiffs filed suit against Maersk Line alleging their decedent, Mr. Klopman-Baerselman, was exposed to asbestos from 1955-1959 while working as a merchant marine onboard the Rotterdam Lloyd. The plaintiffs named Maersk as a successor in interest to the Royal Rotterdam Lloyd. The defendant moved for summary judgment arguing that it had no connection to the Rotterdam Lloyd. The plaintiff sought discovery including the deposition of Defendant's corporate representative Steven Hadder. In the meantime, The defendants removed the case and Maersk moved for summary judgment again. The plaintiff opposed stating that more time was needed to conduct discovery. The court denied the motion giving the plaintiff the benefit of discovery. However, the court noted that plaintiff had ignored the successor in interest challenge thus far.

Discovery continued and the defendant alerted the plaintiff of the successor in interest challenge by letter again. Specifically, counsel informed the plaintiff that Rotterdam Lloyd ceased operations in 1970 and retained its own liabilities in 2000. the plaintiffs deposed the defendant's corporate representative. From that deposition, the plaintiffs wanted to depose a self-employed Dutch attorney, Daniel Sikkens. to explore the successor issue. the plaintiffs submitted a declaration of intent to continue discovery. Maersk sought summary judgment and argued that the plaintiff had not put forth anything regarding a material fact on the successor in interest challenge. The court reminded the standard for summary and stated that continuing summary judgment is warranted "upon a good faith showing by affidavit that the continuance is needed to obtain facts essential to preclude summary judgment." Here, the court quickly concluded that The defendant's motion should be granted. According to the court, the plaintiff had not put forth any showing of fact as to whether the defendant is the successor in interest to Rotterdam Lloyd. Moreover, the plaintiff had an opportunity for discovery and Mr. Sikken's deposition could have already been taken. Accordingly, summary judgment was entered.

Read the full case decision here.

Mass Action Remanded to Montana State Court Based Upon Local Controversy Exception

(U.S.D.C. for the District of Montana, October 15, 2018)

Nearly two hundred plaintiffs filed a lawsuit in Montana state court against BNSF Railway Company (BNSF) and its managing agent, John Swing. BNSF removed the cases as a mass action, as they all arose out of exposure from W.R. Grace's operations in Libby, Montana. The plaintiffs were all Montana residents and argued the case was improperly removed because Mr. Swing was also a resident of the state. Magistrate Judge John Johnston entered Findings and Recommendations in the matter on January 23, 2018. Both sides lodged objections to the Findings and Recommendation.

The district court reviewed the matter ***de novo***. A "mass action" was a class action removable to federal court if the following elements were met: 1) numerosity: the action must involve the monetary claims of 100 plaintiffs or more; 2) the amount in controversy: $5,000,000 or more in the aggregate; 3) diversity: minimal diversity must be met; and 4) commonality: plaintiffs' claims involve common questions of law and fact. The plaintiffs argued that their complaint was a placeholder to preserve the statute of limitations and not to assert a joint claim. The defendants countered that nothing

in the pre-removal pleadings indicated that the plaintiffs intended to try their claims separately. Judge Johnston sided with the defendants and determined the case was a mass action, and removal was therefore proper.

However, the plaintiffs also argued that the local controversy exception applied. This rule stated that if two-thirds of the plaintiffs were citizens of the state in which the action was filed, the district court shall decline jurisdiction if: 1) at least one defendant from whom relief is sought was a citizen of the state in which the action was originally filed and the alleged conduct of that one defendant also occurred in the state; or 2) the primary defendants were citizens of the state in which the action was originally filed. Judge Johnston found that the plaintiffs had met the two-thirds requirement, and further, that they sought significant relief from Mr. Swing, an uncontested resident of Montana. Finally, the plaintiffs cleared the final hurdle for remand and demonstrated that no other similar class actions had been filed against any of the defendants in the last three years.

Based on these facts, the court found that the local controversy exception applied. On October 15, 2018, the district court adopted the Findings and Recommendations in full, and remanded the case to state court.

Read the full case decision here.

Lack of Federal Officer Subject Matter Jurisdiction Leads to Grant of Remand and Award of Fees

The plaintiff filed this action alleging he developed mesothelioma as a result of exposure to asbestos for which the defendants were liable. Specifically, the plaintiff claimed exposure while serving in the United States Navy onboard the U.S.S. Tortuga from 1956-1959.

Defendant Aurora Pump Company (Aurora) removed the case the federal court asserting Federal Officer Removal. The plaintiffs moved to remand. The court began its analysis by stating that removal may be invoked when a defendant establishes that 1) that it is a person within the meaning of the statute 2) that it can assert a colorable federal defense and 3) there is a casual nexus between its actions, taken pursuant to a federal officer's directions, and plaintiffs' claims. The court quickly found that Aurora had not established a federal colorable defense under the Government Contractor Defense. The defense may be asserted when the 1) United States approved reasonably precise specifications; 2) the equipment conformed to those specifications; 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. The court noted that Aurora satisfied the first two prongs of the test. However, Aurora failed to warn the government about the dangers of its equipment according to the court. Moreover, the court noted that alternative material in its equipment could have been used. Specifically, the government guidelines suggested that the government would consider alternatives from those specified by the government. Aurora countered and argued that the Navy was aware of the dangers of asbestos and therefore it had no duty to warn. The court was not persuaded by what it called "non-binding" authority submitted by Aurora to support its contention. The court found that Aurora had not established a federal colorable defense and therefore remanded the case. The court further awarded the plaintiff's request for attorney's fees.

Defendant Fails to Meet Removal Requirements under 28 U.S.C. § 1442(a)

(United States District Court, C.D. California, September 19, 2018)

The plaintiff Randolph Morton (Plaintiff or Morton) filed this personal injury claim in California state court alleging that Morton's asbestos-related disease was allegedly caused by the defendants' acts and omissions involving the use of asbestos at or in the vicinity of Morton's workplace.

The defendant removed the case to federal court (United States District Court, Central District of California) based on federal office removal jurisdiction under 28 ***U.S.C.*** § 1442(a). Here, defendant seeks to put forth the government contractor defense, which outlines that military contractors cannot be held liable under ***state law*** for any injuries caused by the work performed on equipment supplied by the U.S. military when three (3) elements are present: (i) the United States approved reasonably precise specifications; (ii) the work performed conformed to these specifications; and (iii) the government contractor warned the military about any hazards involved in the equipment or services it was contracted to supply that are known to the government contractor but not known to the military. ***See Boyle v. United Technologies Corp.***, 487 U.S. 500, 512 (1988).

The plaintiff argues that defendant failed to meet the requirements that are needed for § 1442(a) removal. The plaintiff emphasized that defendant failed to introduce any evidence that contract specifications had a causal nexus to plaintiffs' claims nor any evidence of Navy policies restricting the safety procedures available to government contractors handling asbestos.

The court ultimately found that defendant failed to demonstrate that it had a "colorable defense". While acknowledging that the Navy requires strict compliance with precise specifications in many facets of shipbuilding, maintenance and repair, the court emphasized that defendant failed to provide any evidence that such specifications placed limits on defendant's ability to implement precautions to protect and warn against the dangers of asbestos.

In conclusion, as defendant failed to establish the necessary requirements for removal under 28 ***U.S.C***. § 1442(a), and no opposition was submitted by another defendant, plaintiff's motion to remand was granted.

Read the full case decision here.

Proper Removal Based Upon Diversity Jurisdiction When Clearly No Case against Non-Diverse Defendant

(United States District Court, Eastern District of Louisiana, August 28, 2018)

The plaintiff Victor Michel filed a personal injury suit in Louisiana state court alleging that his mesothelioma was caused by exposure to asbestos during his work as a parts delivery driver, truck mechanic, and generator service technician. The defendant Cummins, Inc. removed the matter to federal court after receiving a deposition transcript of plaintiff that arguably demonstrated that defendant and Louisiana resident, Taylor-Seidenbach, Inc. (TSI), was fraudulently joined to defeat diversity jurisdiction. The plaintiff moved to remand asserting a lack of diversity jurisdiction, which the court denied.

The plaintiff argued that TSI was properly joined and that Cummins was beyond the 30 day "other paper" deadline for removal. The court determined that the case was beyond the discovery deadline, that no experts had offered commentary on the types of products TSI produced, and that no witnesses on plaintiff's witness lists could establish liability for TSI. An affidavit from another case could not be considered to demonstrate TSI's liability, as the court deemed that it would likely be inadmissible and that it did not establish that the plaintiff had any exposure to TSI products. The court further determined that the 30 day "other paper" clock did not start to run on the date of the plaintiff's deposition or receipt of his deposition transcript. The court concluded that the last opportunity for the plaintiff to obtain evidence to demonstrate a reasonable possibility of recovery against TSI was at the deposition of their expert Dr. Brent Staggs, and that the 30 day clock began to run on receipt of the transcript from his deposition. Thus the plaintiff's motion to remand was denied.

Read the full decision here.

Novel Motion to Remand Denied in California Talc Case

(U.S. District Court for the Central District of California, August 23, 2018)

A group of women filed suit against Johnson & Johnson in the Superior Court for the County of Los Angeles raising claims that the company violated various California codes by failing to warn consumers of exposure to asbestos and talc containing asbestiform fibers in Johnson and Johnson's Baby Powder and Shower to Shower products. On May 31, 2018, Johnson & Johnson removed to federal court on the basis of diversity jurisdiction. Plaintiffs moved to remand by arguing that the court lacked subject matter jurisdiction, not because of a lack of complete diversity, but because the court lacked Article III standing. Plaintiffs' support for this argument was that they "are acting as 'Private Enforcers' seeking the Court's intervention to provide relief for the public at large rather than for redress of their own individualized private injuries." In short, plaintiffs asserted that they have not alleged an injury-in-fact. Johnson & Johnson responded by pointing to the allegations in their complaint where certain injuries-in-fact were alleged. The court therefore denied the motion to remand on this basis.

The plaintiffs also argued that the State of California was the real party in interest in the lawsuit even though it was not named, because it is the government entity on whose behalf the plaintiffs filed. Since California is not a citizen for diversity purposes, plaintiffs contended, diversity jurisdiction does not lie over the case. The court distinguished the cases cited by plaintiffs since they were not filed by private individuals and the State of California was a named party in both instances. The motion to remand was therefore denied.

Read the full case decision here.

Appeals Court Confirms Dismissal Based on Asbestos Supplier's Lack of Contacts with Florida

(United States Courts of Appeals, Eleventh Circuit, August 23, 2018)

The plaintiff James Waite was allegedly exposed to asbestos while living in Massachusetts. He filed suit against multiple defendants, including Union Carbide, alleging that his exposure to asbestos caused him to develop mesothelioma. Mr. Waite was diagnosed in Florida, and he and his wife filed suit in Florida state court. Union Carbide removed the case to federal district court where the court determined that it lacked personal jurisdiction over UC.

The Waites appealed, arguing that the district court erred in dismissing UC for lack of personal jurisdiction because the court could "properly exercise both specific and general jurisdiction over Union Carbide." The Appeals Court disagreed, holding that "Union Carbide is not subject to specific jurisdiction because the Waites cannot show their claims arise out of Union Carbide's contacts with Florida.

The Appeals Court upheld the dismissal.

Read the full case decision here.

District Court Remands Case Back to New Jersey State Court after Federal Defendant is Dismissed

(United States District Court, District of New Jersey, August 17, 2018)

On October 30, 2015, the plaintiffs Thomas Grimes and Estelle Grimes Estelle Grimes initially filed suit in the Superior Court of New Jersey, Middlesex County against a number of defendants alleging that Mr. Grimes's mesothelioma was caused by exposure to defendants'**asbestos**or**asbestos**-containing products. Shortly thereafter, the case was removed to the United States District Court, District Court of New Jersey, following Defendant Crane's Notice of Removal relating to the federal officer removal statute, 28 U.S.C. Section 1442(a)(1).

Pursuant to the case management order of the District Court, a number of defendants, including Crane, filed summary judgment motions under Fed. R. Civ. P. 56. The plaintiffs did not file opposition to a number of defendants' motions, including Crane. Accordingly, the court issued an rrder granting summary judgment as to those unopposed motions and entered judgement in favor of Crane and other defendants. The court noted that four motions for summary judgment, that the plaintiff did oppose, were left to be decided. However, before addressing the merits of these four motions, the Court chose to reconsider the issue of jurisdiction, given that Crane (the party who removed the case initially) was no longer a party to the case.

The court specifically stated: "Because Section 1442(a)(1) authorizes removal of the entire action even if only one of the controversies it raises involves a federal officer or agency, the section creates a species of statutorily-mandated supplemental subject-matter jurisdiction. The district court can exercise its discretion to decline jurisdiction over the supplemental claims if the federal agency drops out of the case, or even if the federal defendant remains a litigant."

Here, if a federal party is eliminated from the suit after removal, while the district court does not lose its jurisdiction over the state law claims against the remaining non-federal parties, the district court does retain the power to either adjudicate the underlying state law claims or to remand the case back to state court. D.C. v. Merit Sys. Prot Bd., 762 F.2d 129, 132-33 (D.C. Cir. 1985). As subject matter jurisdiction over the remaining state law claims could only be predicated by supplemental jurisdiction under 28 U.S.C. Section 1367(c). Here, a court may decline supplemental jurisdiction over a state-law claim where: (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. See 28 U.S.C. § 1367(c).

The Hon. Kevin McNulty, United States District Judge, for the District of New Jersey, found that the discretionary factors under Section 1367(c) weigh in favor of remanding this case back to state court. More specifically, Judge McNulty found that the first three factors applied in that this was an asbestos case implicating complex state law issues; New Jersey has centralized asbestos litigation in Middlesex County; all asbestos-related cases in New Jersey are handled by a single judge with the assistance of a special master; and more importantly, the usual presumption is that state courts are best equipped to handle state cases, particularly a state court that has developed a specialized expertise, which is the case in Middlesex County, New Jersey.

Thus, the case the court declined to exercise supplemental jurisdiction over this case and remanded back to New Jersey. The court further stated that this result would serve the goals of judicial economy and comity by allowing the New Jersey courts to apply New Jersey law.

Read the full case decision here.

Case Remanded to State Court as Shipyard Defendant Fails to Show Causal

(United States District Court, E.D. Louisiana, August 1, 2018)

The plaintiff Terry Brady alleged that his lung cancer was caused by exposure to asbestos while working aboard U.S. Navy vessels from 1968-1989. During the plaintiff's time aboard the USS Robert A. Owens, the ship docked at a shipyard operated by defendant Avondale Shipyards. The plaintiff filed this matter in state court, alleging that the defendants failed to warn of the hazards of asbestos, failed to provide a safe environment, and failed to employ safe procedures for handling asbestos. Avondale removed the case to federal court, asserting that the plaintiff's claims were related to acts performed under the color of federal office.

In evaluating the plaintiff's motion to remand, the court determined that Avondale failed to present any evidence that demonstrated that the U.S. Navy had control over safety procedures at the shipyard during the time it worked on the USS Robert A. Owens. Further, Avondale failed to demonstrate that the government prohibited warnings about the risks of asbestos. Absent this showing, the court determined that Avondale did not show a causal nexus between their actions under color of federal office and Plaintiff's negligence claims. Accordingly, it declined to find federal jurisdiction and remanded the case to the Civil District Court for the Parish of Orleans.

Read the full case decision here.

Remand Affirmed on Appeal Due to Lack of Causal Connection to Support Removal under Federal Officer Statute

(U.S. Court of Appeals, Fifth Circuit, July 26, 2018)

The family of Tyrone Melancon filed suit in Louisiana state court alleging that his development of mesothelioma and subsequent death were caused by his exposure to asbestos at the Huntington Ingalls shipyard where he was employed from 1965 to 1979. The plaintiffs alleged that Huntington Ingalls negligently failed to warn Tyrone Melancon of the dangers of asbestos and failed to implement safety procedures for handling asbestos. Huntington Ingalls removed the case to federal court under the federal officer removal statute, alleging that removal was permissible because the company used and installed asbestos-containing materials during the construction of Navy and Coast Guard ships. The plaintiffs' motion to remand was granted by the district court, holding that Huntington Ingalls did not satisfy the causal nexus requirement necessary for federal officer removal because the government officials had no control over the warnings or safety procedures implemented by Huntington Ingalls.

On appeal, the court analyzed the 2011 amendment to the federal officer removal statute, which unquestionably broadened the scope of the statute. To establish a causal nexus under the statute, the removing party must establish "a 'causal connection' between the charged conduct and asserted official authority." However, the court reiterated its recent holding on this issue, that when the charged conduct was negligent failure to warn, train or adopt safety procedures regarding asbestos, removal would be inappropriate because the nexus requirement is not met. Since these were the allegations in this case,the U.S. Court of Appeals for the Fifth Circuit therefore affirmed the district court's order remanding the case to state court.

Read the full case decision here.

Bankruptcy Status of Louisiana Defendant Does Not Provide Grounds for Removal

(United States District Court, Eastern District of Louisiana, July 26, 2018)

The plaintiff filed suit against multiple defendants alleging that he contracted mesothelioma as a result of exposure to asbestos products at various worksites from 1960-1979. The plaintiff initially filed suit against 20 defendants in the Civil District Court for the Parish of Orleans. On July 23, 2018 Defendants Union Carbide Corporation and Bayer CropScience, Inc. filed a notice of removal, stating that the plaintiff had settled with all remaining parties and alleging that complete diversity existed. Concurrently, the plaintiffs filed a motion to remand, arguing that a nondiverse defendant, Reilly-Benton Company, Inc., still remained in the case.

Reilly-Benton filed for bankruptcy after the plaintiff filed suit, "meaning all claims asserted against Reilly-Benton are subject to an automatic stay."Reilly-Benton is a Louisiana citizen.The defendants argued that Reilly-Benton's citizenship should be disregarded for three reasons: The plaintiff voluntarily discontinued his claim against Reilly-Benton by electing to proceed to trial only against Union Carbide and Anchem; Reilly-Benton would be a nominal defendant and its citizenship would be disregarded for the purposes of diversity jurisdiction; and Reilly-Benton was improperly joined and there is no reasonable possibility that the plaintiff could recover against Reilly-Benton at trial.

The court rejected all three arguments, stating that "removing defendants attempt to ignore the fact that Reilly-Benton is in bankruptcy and that pre-bankruptcy petition claims against Reilly-Benton, such as the instant suit, are barred under automatic stay, with resulting penalties and punitive damages." The plaintiff's case against Reilly-Benton was not discontinued nor abandoned due to any voluntary act of the plaintiff, but rather stayed due to bankruptcy. The presence of Reilly-Benton, a citizen of Louisiana, destroys complete diversity.

The court remanded the case back to state court.

Removal Under Federal Enclave Jurisdiction Deemed Timely

(U.S.District Court for the Western District of Pennsylvania, June 28, 2018)

The plaintiff, Harald Mehnert, filed suit in the Allegheny County Court of Common Pleas, alleging he suffered from mesothelioma due to asbestos exposure incurred while working on Mass Spectrometers at the U.S. Geological Survey Department in Denver, Colorado, from 1959 to 1995. He filed suit on November 27, 2017 and all defendants were served with process by January 17, 2018. The complaint did not allege the location of the plaintiff's work. On April 3, 2018, the plaintiff served answers to interrogatories indicating that he worked at the Denver Federal Center Building in Lakewood, Colorado. Thereafter, defendants removed on the basis of federal enclave jurisdiction. The plaintiff filed a motion to remand.

The plaintiff argued that defendants should have known from the face of the complaint that the plaintiff worked in a federal building. The court ruled that since the complaint did not specify as such, and defendants had no duty to investigate beyond the face of the complaint, their removal was timely. The plaintiff's motion to remand was therefore denied.

Defendant's Joinder Denied; Parallel Suits Allowed in Federal and State Court

(U.S.District Court for the Southern District of New York, June 21, 2018)

On October 3, 2017, the plaintiffs filed two lawsuits in New York state court against two different groups of defendants. One lawsuit was filed against 83 defendants, not including Crane Co. (Crane), alleging that John Grimes developed mesothelioma as a result of exposure to defendants' asbestos-containing products. At present, that matter remains pending in state court. The second action—the instant action—was filed against four other defendants, including Crane. The plaintiffs similarly alleged that Mr. Grimes developed mesothelioma as a result of exposure to defendants' asbestos-containing products. On October 30, 2017, defendants Foster Wheeler LLC and General Electric Company, two of the four defendants in the instant action, removed the case to federal court.

Crane moved for joinder of the necessary parties under Rule 19 and requested that the court require the plaintiffs to join in the action all defendants that they sued in the parallel state court action. Crane argued that the parallel suits "request the same relief, under substantially the same legal theories, for the same injuries, arising from the same alleged exposure to asbestos." They further argued that the plaintiffs pursued the two lawsuits to segregate defendants like Crane who could remove the case to federal court from those who could not. The plaintiffs admit to this segregation to avoid the possibility of removal, but contended that joinder was not appropriate.

The court stated that "under well-established law… the plaintiffs did not need to include all joint tortfeasors as defendants in a single lawsuit." If Crane is required to pay more than its equitable share, it has the right to pursue reimbursement from absent joint tortfeasors. The court further declined to accept Crane's contention that "joinder is appropriate to protect the public interest in avoiding duplicative litigation;" holding that "Rule 19 does not direct the court to consider the 'public interest' or the risk of multiple lawsuits—as opposed to multiple obligations—when deciding whether a party is required to be joined as a party to an action." Accordingly, that joinder of the state court defendants may be efficient does not make those defendants necessary parties.

The motion for joinder was denied.

Read the full case decision here.

Concrete Factual Information Starts the 30-Day Removal Clock

(U.S.District Court, N.D. Illinois, Eastern Division., June 22, 2018)

In September 2016, the plaintiff was diagnosed with mesothelioma, and in September 2017, he filed suit against a defendant, and a number of other parties, alleging his illness was caused by exposure to asbestos. The plaintiff claimed that his exposure occurred between 1970 and 2004 while he was serving in the U.S.Air Force, working as a commercial airline mechanic, and/or engaging in home remodeling and other activities.

The defendant was served with the plaintiff's complaint on September 21, 2017 and filed an answer on October 30, 2017, including an affirmative defense that the defendant was immune from liability as a government contractor who manufactured the products to which the plaintiff claims exposure from. In October 2017, the plaintiff executed an authorization for release of his military records. About a month later, in November 2017, the plaintiff filed a disclosure of expected trial witnesses, which included a disclosure that the plaintiff and several other witnesses intended to testify about the plaintiff's work at certain military bases. On March 13, 2018, the defendant finally gained electronic access to the plaintiff's military records that showed, while serving in the U.S.Air Force, the plaintiff worked on various airplanes manufactured by the defendant. One week later on March 20, 2018, day one of the plaintiff's discovery deposition took place and it was revealed that the plaintiff had in fact worked on one of the specific aircrafts manufactured by the defendant. On April 12, 2018, the defendant removed the case to federal court on the basis of federal officer jurisdiction. The plaintiff moved to remand back to state court arguing defendant's notice of removal was untimely as it was not filed within 30 days of the defendant being served with the complaint. The defendant opposed the remand, arguing their notice was timely and filed within 30 days of obtaining the information needed to satisfy a basis for its assertion of federal officer jurisdiction.

The plaintiff relies primarily upon the fact that the defendant asserted in its affirmative defenses its immunity as to the government contractor defense. The court acknowledged this fact, but did not find this dispositive. The court noted, specifically, that the standards governing assertion of an affirmative defense and the decision to remove a case to federal court are quite different. The court conceded that a defendant could assert a government contractor defense "based only on the possibility that a federal contract would be at issue." ***Bond v. Am. Biltrite Co.***, No. CV 13-1340-SLR-CJB, 2014 WL 657402, at *4 (D. Del. Feb. 20, 2014). By contrast, "a defendant seeking to remove under Section 1442(a) must be able to muster more evidence than that—it must instead have identified concrete factual information that, viewed in the light most favorable to it, entitles it to a complete defense. ***Id.*** Here, the defendant did not have that **"concrete factual information"** until it learned specific information through the plaintiff's discovery deposition. If the defendant acted precipitously and filed a notice of removal based on incomplete information, they would have done so erroneously and potentially could have faced sanctions for a baseless removal.

Based upon the above, the court found that the 30-day removal deadline did not begin until the defendant learned on March 13, 2018, through the plaintiff's military records, of the plaintiff's potential exposure to the defendant's products, and notice of removal filed on April 12, 2018, was timely. The motion to remand was denied.

Remand Denied Upon Plaintiff's Failure to Properly Disclaim Federal Officer Removal

(U.S.District Court, S.D. Illinois. June 19, 2018)

The plaintiff Janice Reinbold filed suit against several defendants alleging her decedent, Gerald Reinbold, developed lung cancer from occupational exposure to asbestos while working as a shipfitter at the Puget Sound Naval Shipyard, amongst other sources. Defendant Crane Company (Crane) removed the case to federal court asserting Federal Officer Removal. The plaintiff moved to remand.

The court reminded the parties of the standard for Federal Officer Removal, and stated that the statute allows removal when "action is brought against the U.S.or an agency thereof of any officer (or any person acting under that officer) of the U.S.or of any agency thereof, sued in an official or individual capacity for any act under the color of office." First**,** the court analyzed the plaintiff's disclaimer. Here, the plaintiff added to her complaint that every claim arising under the constitution, treaties, or laws of the U.S.was expressly disclaimed (including any claim arising from an act or omission on a federal enclave, or any federal office of the U.S. or agency or person acting under him occurring under color of such office). No claim of admiralty or maritime law was raised.

The court noted certain disclaimers were valid disclaimers of Federal Officer Removal. Relying on the ***Doughtery*** decision, disclaimers that disclaimed "claims of a specific nature" were valid where their purpose was not to evade federal jurisdiction. For the instant disclaimer, the court found it to be "circular" and without completeness as to all

exposure alleged on Navy jobsites. Further, it did not waive claims for exposure that may have taken place on federal premises. Therefore, the disclaimer was not sufficient.

Th plaintiff then argued that Crane failed to establish the elements required for Federal Officer Removal. Specifically, the plaintiff claimed that Crane's affidavits and exhibits did not establish its government contractor defense. However, the court quickly brushed this aside as the standard only required Crane to present a "colorable" defense rather than a necessarily prevailing one. The next element, whether Crane fit the statutory definition of a person, was not challenged by the plaintiff. The court also found that Crane acted under the instructions of the U.S. Navy. The causal connection requirement was also satisfied as the plaintiff claimed her husband was exposed to Crane products whereas Crane claimed the U.S. Navy required it to use those products. Lastly, the court honed in again on the issue as to the "colorable" claim. It did not need to determine whether Crane would prevail but rather whether it had jurisdiction under a colorable defense. Here, the court found the elements were satisfactorily established by Crane to assert the Federal Officer Removal statute. Remand was therefore denied.

Read the full case decision here.

Talc Case Remanded as Defendant Fails to Establish Improper Joinder

(U.S.District Court, Eastern District of Louisiana, May 17, 2018)

The plaintiff, Marilyn Rousseau, sued defendants Johnson & Johnson (J&J) and K&B Louisiana Corporation (d/b/a Rite Aid Corporation), among others, claiming that her mesothelioma was caused in part by her use of their allegedly asbestos-contaminated talc products. Plaintiff, who was a Louisiana citizen, originally brought the suit in state court in Orleans Parish. J&J removed the case to federal court, claiming diversity jurisdiction and contending that K&B Louisiana, the only non-diverse defendant entity, was improperly joined.

Noting that the improper joinder doctrine constituted a narrow exception to complete diversity with a heavy burden of proof on the removing party, the court granted the plaintiff's motion to remand. "Improper joinder can be established in two ways: 1) actual fraud in the pleading of jurisdictional facts, or 2) the inability of the plaintiff to establish a cause of action against the non-diverse party in state court." Focusing on the second prong, J&J had claimed that the factual allegations of the plaintiff's petition specific to K&B Louisiana were not sufficient to establish professional vendor liability under Louisiana law, which holds that the duties of a seller found to be a professional vendor are the same as a manufacturer, who is charged with knowledge of the potential defects in its products. In support of its decision to remand, the court disclaimed these "technical deficiencies," and pointed to the need for discovery for the plaintiff to develop her claims against K&B Louisiana, and others given that the facts leading to the plaintiff's suit occurred forty to seventy years ago. As it could not conclude with any certainty that the plaintiff had no possibility of recovery against K&B Louisiana, the case was remanded to state court.

Read the full decision here.

Lack of Causal Nexus Leads to Grant of Remand Against Shipyard Defendant

(U.S. District Court for the Eastern District of Louisiana, May 4, 2018)

The plaintiff filed suit against several Defendants including Avondale Shipyards. James Latiolais allegedly developed mesothelioma from his work as a machinist onboard the USS Tappahannock. Avondale removed the case after the plaintiff's deposition concluded. The removal was made pursuant to Federal Officer Removal Statute, 28 U.S.C. § 1442 (a)(1). The plaintiff moved to remand.

The court began its analysis by discussing the elements associated with Federal Officer Removal. First, the defendant must meet the criteria of being a "person" which includes corporations like Avondale, according to the court. Second, the causal nexus requires a showing that the defendant's conduct was directed by the federal government and whether that conduct "caused the plaintiff's injuries." Avondale easily met the first element of being a person as defined by the statute. As for the second element, Avondale argued that under ***Zeringue***, the statute's language had been enlarged by adding "relating to". However, the court quickly pointed out that the ***Zeringue*** decision also noted that it does not supersede the court's decision in ***Bartel.*** That decision concerned federal officer removal in the plaintiff's failure to warn case and ***did not*** apply to strict liability. Here, the plaintiff asserted claims against Avondale sounded in negligence rather than strict liability. According to the court, nothing illustrated that the government directed Avondale how to warn or issue safety procedures at the shipyard. Therefore, Avondale could not establish the causal nexus with respect to the removal statute. Consequently, remand was granted.

Read the full decision here.

Failure to Adopt Safety Measures is Private Conduct That Implicates No Federal Interest

(U.S. Court of Appeals, Fifth Circuit, May 1, 2018)

Several former employees of Huntington Ingalls, including Robert Templet, brought suit in Louisiana state court, alleging that the company failed to warn them of the risks of asbestos exposure and failed to implement proper safety procedures for handling asbestos. Templet worked for Huntington Ingalls from 1968 to 2002 and alleged his handling of asbestos-containing materials at various worksites from 1968-79 caused him to contract mesothelioma.

Huntington Ingalls removed the case to the U.S. District Court for the Eastern District of Louisiana under the federal officer removal statute, 28 U.S.C. Section 1442(a)(1), alleging that the company used asbestos to construct vessels under government-mandated contract specifications. The Eastern Destruct remanded the case back to state court, and Huntington Ingalls appealed to the U.S. Court of Appeals, Fifth Circuit.

The Appeals Court recently examined this issue in ***Legendre v. Huntington Ingalls, Inc.*** — please see our detailed analysis. In ***Legendre***, the Appeals Court confirmed that asbestos claims regarding negligent failure to warn, train, or implement safety procedures do not give rise to federal jurisdiction when unrebutted evidence shows that the government did nothing to direct the shipyard's safety practice. The facts in ***Templet*** are the same as ***Legendre***, and the Appeals Court affirmed the District Court's order of remand.

Read the full decision here.

Case Remanded Based Upon Lack of Fraudulent Joinder

(U.S. District Court for the District of South Carolina, April 16, 2018)

The plaintiff filed a lawsuit in the Court of Common Pleas for Darlington County, South Carolina, alleging that Bertila Boyd-Bostic suffered from mesothelioma due to asbestos exposure in the 1980s. On March 2, 2018, a Third Amended Complaint was filed, alleging that Johnson & Johnson, Imerys Talc America, Rite Aid of South Carolina and others were liable for Ms. Boyd-Bostic's mesothelioma, based upon her use of baby powder. The recently-joined defendants removed the case on April 6, 2018.

The plaintiff filed an emergency motion to remand, arguing that there was incomplete diversity between the parties due to Rite Aid of South Carolina's citizenship in that state. Removing the defendants countered by arguing that Rite Aid of South Carolina was improperly named, and that the correct entity was EDC Drug Stores, which did not have South Carolina citizenship. The court interpreted this argument as one based upon the fraudulent joinder doctrine. The plaintiff offered evidence that Ms. Boyd-Bostic used baby powder purchased at a Rite Aid in Hartsville, South Carolina as early as 1987, and additional evidence that EDC Drug Stores was not incorporated until 1997. Therefore, the plaintiff demonstrated at least a plausible claim against Rite Aid of South Carolina. The court accordingly ruled that the party was not fraudulently joined and remanded the case to state court.

Read the full decision here.

Remand Affirmed Due to Lack of Causal Nexus in Take-Home Exposure Case

(U.S. Court of Appeals, Fifth Circuit, March 16, 2018)

The Legendre brothers filed suit in Louisiana State Court on behalf of their sister, Mary Jane Wilde, who died from complications related to mesothelioma. Their father, Percy Legendre, worked at a shipyard owned and operated by Huntington Ingalls, Inc. (Avondale) and was allegedly exposed to asbestos. The plaintiffs further alleged that Mary Jane was exposed to asbestos via fibers that were on her father's work clothes and this exposure caused her to develop mesothelioma.

Defendant Avondale invoked the federal officer removal statute and removed the case to the Eastern District of Louisiana. The District Court subsequently remanded the case back to state court, holding that Avondale failed to show the required "causal nexus" to support federal jurisdiction.

Avondale appealed the remand. Under the statute, an action "against or directed to…any officer of the U.S.or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such office" may be removed

to federal court. To remove, a defendant must show "(1) that it is a person within the meaning of the statute, (2) that it has a colorable federal defense, (3) that it acted pursuant to a federal officer's directions, and (4) that a casual nexus exists between its actions under color of federal office and the plaintiff's claims." The district court held that Avondale could not meet the casual nexus prong and therefore did not examine the other elements of the statute.

The appeals court held that the failure to warn, train, and adopt safety measures regarding asbestos was "private conduct that implicated no federal interest" and therefore an extension of the statute to allow defendants to remove would have "stretched the causal nexus requirement to the point of irrelevance." Even though the federal requirements for shipbuilding required asbestos insulation, and the federal government oversaw construction to ensure that Avondale built the tugs to the government's specifications, nothing about the arrangement suggested that Avondale was not "free to adopt the safety measures the plaintiffs now allege would have prevented her injuries." Absent such a conflict between federal direction and the plaintiffs' state-law claims, remand is required.

The order of the district court was affirmed and the case remanded back to state court.

Read the full decision here.

Second Motion to Remand Denied When Plaintiff Asserted Claims She Previously Waived

(U.S. District Court for the District of Oregon, February 2, 2018)

The plaintiff initially filed her lawsuit on behalf of her father's estate, in Oregon state court, alleging he was exposed to asbestos while working at Norwest Marine & Iron Works Shipyard and Albina Engine & Machine Works Shipyard. Both shipyards serviced military and civilian vessels. Neither the original nor amended complaints contained specific ship information. Defendants GE and CBS removed to federal court based upon the federal officer removal statute after plaintiff provided a ship list. The plaintiff filed a motion to remand, asserting that she was not claiming exposure aboard any U.S. Navy vessel. The court granted the motion to remand.

Shortly after remand, the plaintiff sent the defendants a request for production of documents regarding evidence of the plaintiff's exposure while working in the pump rooms on the USS Franklin D. Roosevelt. The next day, a settlement attorney acting on behalf of the plaintiff sent counsel for GE and CBS emails summarizing the facts of the case and alleging exposure to GE and CBS products on Navy ships, identifying several by name. Following the discovery request and settlement emails, GE and CBS again removed to federal court. The plaintiff again filed a motion to remand, stating that the discovery request was sent in error, that the settlement attorney was not an attorney of record and that the correspondence cannot serve as a basis for removal.

The court found that a settlement-related letter or email constituted notice, pursuant to 28 U.S.C. § 1446(b), to the extent that it reasonably puts a defendant on notice that the case is removable. The court found plaintiff's argument that the email was inadmissible pursuant to the Federal Rules of Evidence unpersuasive. The court stated that the email was not being used to prove a claim, but to show that the plaintiff demonstrated an intent to pursue claims against defendants based on exposure aboard U.S. Navy ships. Both emails identified in detail the U.S. Navy vessels on which the plaintiff's decedent allegedly worked, the equipment belonging to each defendant found aboard those ships, and the work that the plaintiff's decedent performed on those ships. The emails only identified U.S. Navy vessels and no other ships. Accordingly, the court found the email indicated that the plaintiff had an intent to pursue the claims.

The plaintiff argued that the settlement attorney was not an "attorney of record" and therefore the emails should be ignored. However, the plaintiff admitted that her counsel retained a national law firm to assist with settlement, who then reached out to the attorney who sent the email, as was customary in other cases. The court found the fact that the plaintiff had not communicated directly with the attorney who sent the email irrelevant. Based on all of these factors, the court denied the plaintiff's motion to remand.

Read the full decision here.

Four Cases Improperly Removed Due to Citizenship of Managing Agent of Defendant

(U.S. District Court for the District of Montana, February 1, 2018)

Four plaintiffs originally filed suit in the Eighth Judicial District of Cascade County Montana alleging exposure to asbestos in Libby, Montana. Defendant BNSF removed the case to federal court on diversity of citizenship grounds, and alleged that BNSF's managing agent John Swing was fraudulently joined. The court reviewed the Magistrate

Judge's Findings and Recommendations following a November 2017 hearing, and remanded all four cases to state court.

Each of the four plaintiffs named 80-year-old Montana resident John Swing in their complaints, and gave a two sentence description of his role with BNSF. Swing allegedly acted as a supervisory agent for BNSF in Libby Montana from 1973 to 1984, with safety concerns falling in his purview. The allegations of the complaints were the same as to Swing and BNSF: that they failed to inquire, study and evaluate the dust hazard to human health, that they failed to take measures to prevent toxic dust from collecting upon and escaping BNSF's property, and that they negligently failed to warn the plaintiffs of the true nature of the hazardous effects of the dust.

The Magistrate Judge found that Montana law allowed employees to be named as individuals when allegations existed against them personally, and that courts within the district have "deemed it sufficient to hold the agent personally liable if the agent either ignored warnings, or participated in the principal's tortious conduct." The defendants argued that. Swing owed no duty to the plaintiffs, and that any alleged negligence committed by Swing occurred within the course and scope of his employment. The reviewing court determined that the plaintiffs' complaints sufficiently alleged claims for relief against Swing, stating that "(t)he Court must look at whether the plaintiff truly possesses a cause of action against the alleged fraudulent defendant, as opposed to evaluating whether the alleged fraudulent defendant could propound a defense to an otherwise valid cause of action." The reviewing court adopted the Findings and Recommendations of the Magistrate Judge in full and remanded all four cases, but denied a request for attorneys' fees by determining that the removal was objectively reasonable.

Read the ***Braaten*** decision here.

Read the ***Flores*** decision here.

Read the ***Woller*** decision here.

Read the ***Johns*** decision here.

Plaintiff's Motion to Remand to State Court Denied After Court Finds Federal Jurisdiction under the Outer Continental Shelf Lands Act

(U.S. District Court for the Eastern District of Louisiana, January 24, 2018)

On June 16, 2017, plaintiff Federico Lopez filed suit against 15 defendants, claiming that his exposure to asbestos as a welder and pipefitter at numerous locations caused his mesothelioma. Defendants Shell Oil Company and Tennessee Gas Pipeline, LLC, removed the action, invoking federal subject matter jurisdiction pursuant to the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. Section 1349(b), and alternatively, pursuant to federal question jurisdiction, 28 U.S.C. Section 1331. Further, the defendants contended that the court had supplemental jurisdiction over the plaintiff's claims against all other defendants pursuant to 28 U.S.C. Section 1367(a) as those claims are so related to the claims falling under this Court's original jurisdiction such that they form part of the same case or controversy. Finally, the defendants asserted that removal was timely because the Notice of Removal was filed within 30 days of the plaintiff's August 16, 2017 deposition, during which the defendants first ascertained that the plaintiff's claims against them arose out of, or were in connection to, the defendants' operations on the Outer Continental Shelf (OCS), which involved the exploration, development, and/or production of minerals.

Thereafter, the plaintiff filed a Motion to Remand, seeking remand on the basis that the court lacked subject matter jurisdiction. The plaintiff alleged that defendants failed to carry their burden of showing that OCSLA, or any other basis for federal subject matter jurisdiction, applied in this case. The plaintiff argued that his injuries did not arise out of or in connection with the exploration, development, or production of minerals: "[R]ather, Plaintiff alleges that he was exposed to asbestos in the course of building or repairing platforms, not operating them, and Plaintiff was not exploring, developing, or producing minerals when he was exposed." Lastly, the plaintiff asserted that OCSLA does not provide a basis for removal because he alleged solely state law causes of action and did not assert a cause of action under OCSLA.

The District Court rejected the plaintiff's "limited and quite literal reading of OCSLA, which is in direct contravention of the Fifth Circuit's consistently broad interpretation." The court applied a two-prong jurisdiction test and held that OCSLA confers original jurisdiction. The plaintiff's "injury-causing activities—exposure to asbestos while constructing, servicing, and maintaining offshore drilling and production platforms—are sufficient physical acts constituting the requisite operation under OCSLA, and that Plaintiff's work furthered mineral development." The court further

determined that "at least part of the work that Plaintiff alleges caused his exposure to asbestos arose out of or in connection with the OCS operations."

Ultimately, the court denied the plaintiff's Motion to Remand.

Read the full decision here.

Removal Under Federal Officer Removal Statute Held to Begin on Date of Receipt of Deposition Transcript

(U.S. Court of Appeals for the Fifth Circuit, January 11, 2018)

On February 23, 2017, the plaintiff filed a complaint against Avondale Shipyards, and numerous other defendants, alleging he suffered mesothelioma from his employment at Avondale. The plaintiff was deposed over eight days from March 9 to April 13, 2017. He was cross-examined by counsel for Avondale on March 10 and 20, 2017. On March 28, 2017, counsel for Avondale received a link to the deposition transcript. Avondale removed the matter on the basis of federal officer jurisdiction on April 27, 2017, 30 days following receipt of the transcript. The plaintiff filed a motion to remand on the basis that the removal was untimely, which was granted by the District Court.

The Fifth Circuit detailed the statutory language permitting removal, and after a thorough statutory construction analysis, found that oral testimony could not be considered "other paper" under the removal statute. While other circuit courts have held that starting the removal clock on the date of receipt of the transcript can be subject to manipulation, the Fifth Circuit held that a bright-line rule will prevent "protective" removals being effected before the transcript is produced. The Fifth Circuit also held that deposition transcripts were necessary to provide the evidence to demonstrate removal is proper. Therefore, the Fifth Circuit adopted the bright-line rule that the deadline to remove begins to run upon receipt of the deposition transcript. The Fifth Circuit then reversed the remand order and sent the case back to district court.

Read the full decision here.

Denial of Remand When Removal Under Federal Officer Removal Statute Deemed Timely

(U.S. District Court for the District of Maryland, January 10, 2018)

The plaintiff filed her lawsuit in the Circuit Court for Baltimore County on June 5, 2015, alleging the decedent was exposed to asbestos at Bethlehem Steel Sparrows Point Shipyard as a riveter heater and boiler maker from 1948 through the 1970s. A co-worker was deposed on December 11, 2015, and testified that decedent was exposed to asbestos from Foster Wheeler products while building ships for the Vietnam War. Foster Wheeler removed the case base on the Federal Officer Removal Statute to the U.S. District Court for the District of Maryland on January 11, 2016. The plaintiff filed a motion to remand on February 9, 2016 on the basis that Foster Wheeler had not established a colorable federal defense. Foster Wheeler appealed to the Fourth Circuit Court of Appeals, and prevailed on that issue. The Fourth Circuit remanded to the District Court to consider whether the removal was timely.

Pursuant to statute, removal must be effected within 30 days of receiving the initial pleading or "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." Foster Wheeler argued that the removal was timely because the co-worker testimony was the first time the necessary "triangular nexus" between the defendant and decedent's alleged exposure aboard a U.S. Navy vessel had been established. The plaintiff countered that Foster Wheeler was aware of the information in the co-worker's testimony no later than November 30, 2015, when a list of ships constructed at the shipyard from 1948 to 1979 was provided to Foster Wheeler. The plaintiff had also previously produced Answers to Interrogatories indicating decedent was exposed to asbestos from Foster Wheeler boilers at Sparrows Point. The District Court noted that the Fourth Circuit has cautioned against inquiring into defendants' subjective knowledge. The District Court found that whether decedent actually worked on any of the Navy ships was not apparent from the four corners of the discovery materials provided by plaintiff. The court therefore held that the co-worker testimony was the first "paper" that established the "triangular nexus." Removal was therefore timely, and the motion to remand was denied.

Read the full decision here.

Other Remand/ Removal Decisions

- Federal Officer Jurisdictions
  - **Cases Remanded After Court Determines Defendant Shipbuilder Controlled Safety Procedures**
    (U.S. District Court for the Eastern District of Louisiana, April 11, 2018)

Statute of Limitations Decisions

Summary Judgment in Favor of Bankrupt Wisconsin Company Affirmed on Statute of Limitations Grounds

(California Court of Appeal, First District, November 26, 2018)

Plaintiff David Hart appealed the entry of summary judgment in favor of Special Electric Company on the basis that the claims against the company were time-barred under Wisconsin law. The plaintiff sued Special Electric alleging that his mesothelioma was caused by exposure to asbestos from products supplied by the company.

Special Electric, a Wisconsin corporation, filed for bankruptcy under Chapter 11 in 2004, and by 2006, a plan of reorganization had been entered. By then, all of the company's assets had been sold and it had no operations, officers or directors. Its lone employee served as its post-bankruptcy director and president. The company was administratively dissolved in 2012, pursuant to Wisconsin law, after failing to submit the required annual reports and fees. On May 8, 2014, the company's insurers published a Notice of Dissolution in three Wisconsin newspapers stating that a two year statute for claims against Special Electric would expire in May 2016. The plaintiff was diagnosed with mesothelioma in late 2015. He filed suit approximately four months after the claims period in the Notice of Dissolution had expired. Summary judgment was granted on the basis that the Notice of Dissolution was sufficient under Wisconsin law and the claim was therefore time-barred.

On appeal, the plaintiff argued that the statute of limitations was preempted by Special Electric's bankruptcy reorganization plan. The court found this argument unpersuasive since the plan specifically allowed for the application of state law. The plaintiff also argued that the Notice of Dissolution was insufficient under Wisconsin law. The court analyzed the Notice, and found that the bankruptcy reorganization plan permitted such notice, and further, required Special Electric's insurers to defend against unliquidated personal injury claims. The plaintiff also argued that the Notice of Dissolution failed to include the type of information that must be included in a claim, but the court found this defect to be not fundamental. The court concluded that this technical defect did not prejudice plaintiff, and affirmed the entry of summary judgment in favor of Special Electric.

Read the full decision here.

Pennsylvania Superior Court Refuses to Extend Statute of Limitations for Employee's Exposure Claims

(Pennsylvania Superior Court, November 16, 2018)

The Pennsylvania Superior Court, in an unpublished opinion, recently declined to extend the statute of limitations for workplace exposure claims brought by employees. Since the ***Tooey*** case was decided in 2013, Pennsylvania law has allowed employees to bring lawsuits against their employers if the diagnosis of an occupational disease occurred more than 300 weeks after the date of last exposure to the hazardous substance. However, the new case law did not alter the statute of limitations for brining such claims.

In ***Moeller v. Armstrong World Industries***, John Moeller alleged that Michael Moeller died from blood cancer caused by exposure to harmful chemicals during his employment. Michael Moeller died on February 23, 2010. The lawsuit was not filed until September 30, 2015. On October 27, 2017, the plaintiff amended the complaint to add survival and wrongful death claims, well beyond Pennsylvania's two year statute of limitations for both actions. In January 2018, the trial court sustained defendant's preliminary objections and dismissed the lawsuit as being time-barred. The statute of limitations for survival claims begins, at the latest, on the date of death. For wrongful death claims, it always begins at the date of death. Therefore, the statute of limitations on the plaintiff's claims expired on February 23, 2012.

On appeal, the plaintiff argued that the statute of limitations did not begin to run until the aforementioned ***Tooey*** case was decided in November 2013. The Superior Court noted that the ***Tooey*** case did not create a new cause of action, nor did the Workers' Compensation Act previously bar the plaintiff's claims. The Superior Court held that the plaintiff could have filed suit within two years of the decedent's death, and argued that the exclusivity provision of the Workers' Compensation Act did not bar such claims, as indeed the plaintiff did in ***Tooey***. As the plaintiff failed to make such an argument, the statute of limitations could not be extended and the dismissal was affirmed.

Read the full case decision here.

Notice of Claim Provisions Bar Jurist's Asbestos Claims against Municipality

(Court of Appeals of Texas, Houston (1st Dist.), August 31, 2018)

Judge James Farris spent almost his entire legal career, until retiring in December of 1996, in the Jefferson County courthouse, which included a period of asbestos remediation at the courthouse, during which he was allegedly exposed to asbestos. Judge Farris developed mesothelioma in October of 2004 and tragically passed away just nine days after he first sought medical treatment. Judge Farris's widow, Ellarene Farris, asserted wrongful death and survival causes of action against numerous entities, including Jefferson County, in its capacities as premises owner and employers. The county challenged jurisdiction based on the 6 month notice of claim provisions applicable to it as a governmental entity. While the estate provided notice within 6 months from the date of Judge Farris's death, the Appellate Court ruled that the notice was untimely as it should have been provided within 6 months of Judge Farris's retirement in 1996. The estate contended that the death of Judge Farris was an incident necessary to the wrongful-death claim. However, the court held that the wrongful death claim was derivative of the personal injury claim, which was also bared by the 6 month notice requirement. Justice Terry Jennings, delivered a dissenting opinion arguing that "[s]tunningly, the majority holds that the claims asserted by Ellarene are barred by governmental immunity because she did not provide notice of them to Jefferson County within six months of Judge Farris's final exposure to asbestos in December 1996 — before the existence of any injury or damage."

Read the full case decision here.

Louisiana Statute of Limitations Bars Wrongful Death Claim Filed in Delaware

(Superior Court of Delaware, March 26, 2018)

The plaintiff, Sandra Kivell, filed a wrongful death and survival claim alleging her husband's death was caused by mesothelioma. He passed on September 5, 2015, and the new claims were filed on September 30, 2016. The plaintiff's decedent had originally filed a complaint before his death. Georgia-Pacific filed a motion for judgment on the pleadings, arguing that the claims were filed beyond Louisiana's one year statute of limitations for wrongful death and survival claims. The plaintiff did not contend that the Louisiana statute of limitations did not apply. Rather, she countered that the claims related back to the original complaint, thereby circumventing the statute of limitations.

The court applied Delaware law because the issue was procedural. The court analyzed whether the new claims were amended or supplemental pleadings. The former only applied to matters that have taken place prior to the date of the pleading to be amended. Supplemental pleadings applied to transactions setting forth transactions or occurrences which have happened since the date of the pleading to be supplemented. Therefore, the court held that wrongful death and survival claims were not amendments to the original complaint, as they necessarily did not relate to matters that took place prior to the date of the pleading being amended. The court found the wrongful death and survival claims time barred and granted the motion for judgment on the pleadings.

Read the full decision here.

Plaintiffs' Asbestos-Related Claims Time-Barred Due to Prior Settlement Agreement

(U.S. Court of Appeals, Fifth Circuit, January 4, 2018)

The plaintiffs - appellants are the widow and surviving children of Raymond J. Lemieux, Sr..Mr. Lemieux, Sr. worked for Johns-Manville in Marrero, Louisiana from 1956 to 1970 during which time he wore a respirator designed by American Optical, Defendant-Appellee. Raymond, Sr. developed asbestos-related lung cancer, which eventually caused his death in 2015; prior to his death, he filed suit in 2011 against American Optical stemming from his use of their respirator. Represented by his attorney, Raymond, Sr. entered into settlement negotiations with American Optical. The plaintiffs were unaware of these discussions, but as a condition of Raymond, Sr.'s settlement with American Optical, they eventually signed sworn, notarized Settlement agreements.

Nearly one year after Raymond Sr.'s death and over five years after executing the settlement agreements, the plaintiffs filed suit against American Optical in the U.S. District Court for the Eastern District of Louisiana. In bringing their claims, the plaintiffs raised the unenforceability of the settlement agreement asserting that it was null and void under Louisiana law and sought a declaration holding as much.

American Optical filed a Rule 12(b)(6) motion to dismiss the plaintiffs' claims on the basis that (1) the settlement agreement plainly barred their claims, (2) the plaintiffs' claim that the Settlement agreement is relatively null was time-barred because more than five years have passed since it was executed, and (3) even if the plaintiffs could challenge

the settlement agreement, the plaintiffs' complaint failed to allege sufficient facts to set forth any plausible claim of relative nullity. The district could hold that the plaintiffs' claim that the settlement agreement is relatively null is barred by Louisiana's five-year prescription period for such claims. Even if the claim was not barred, the court alternatively held that the plaintiffs' consent to the settlement agreement was not vitiated by error, fraud, or duress. The district court dismissed the plaintiffs' claims with prejudice; The plaintiffs' timely appealed.

Under Louisiana Law, a suit seeking annulment of a relatively null contract must be brought within five years from the time the ground for nullity either ceased, as in the case of incapacity or duress, or was discovered, as in the case of error or fraud. Prescription statutes are strictly construed against prescription and in favor of the obligation sought to be extinguished. As to the settlement agreement, The plaintiffs only allege relative nullity and do not dispute that absent the settlement agreement being declared null, their claims against American Optical would be barred by its plain terms.

The plaintiffs allege three reasons why they failed to discover their nullity cause of action due to fraud and misrepresentation: (1) Raymond Sr.'s attorney falsely advised the plaintiffs that they were required to sign the released solely to assist Raymond, Sr. with receiving a settlement and the plaintiffs' relied on that advice; (2) American Optical misrepresented in the release that Raymond Sr.'s attorney was acting as the plaintiffs' attorney; and (3) Raymond Sr.'s lawyer remained silent regarding his ethical duty to disclose his conflict of interest and advise the plaintiffs that they ought to retain their own counsel.

The appeals court held that even if it accepted the plaintiffs' allegations as true, these bases were readily apparent or reasonably ascertainable at the time the agreement was signed or the years that followed. With reasonable diligence, the plaintiffs' could have recognized their misunderstanding of the terms of the settlement agreement. Further, the plaintiffs fail to assert how, if at all, Raymond, Sr.s death changed the plaintiffs' understanding of the settlement agreement or their ability to assert a nullity cause of action within the five-year prescriptive period.

The appeals court affirmed the district court's dismissal of the plaintiffs' claims against American Optical.

Read the full decision here

Statute of Repose Decisions

Application of Statute of Repose Upheld for Material Supplier

(Court of Appeals of Wisconsin, August 7, 2018)

The plaintiff Thomas Mohn alleged that he developed lung cancer from exposure to asbestos while working with insulated turbine blankets supplied by defendant Sprinkmann during the construction of the Genoa power plant in the 1960s. Sprinkman filed a motion for summary judgment on statue of repose grounds, which the trial court granted. The plaintiff appealed, and the Wisconsin Appellate Court affirmed.

Wisconsin's statute of repose imposed a time limit of ten years for bringing claims related to the improvement of real property. The statute has specific language extending its protections to those involved in the "furnishing of materials for" the construction of the improvements, but left an exception which did not protect manufacturers or producers of defective materials used in the construction of real property improvements. Prior authority in Wisconsin stated that the statute of repose "protects all persons involved in the improvement to real property but does not protect individuals whose liability arises based on conduct occurring prior to or subsequent to the improvement." The plaintiff argued that the statute of repose did not apply to Sprinkmann because the insulation that it supplied was defective, not its act of furnishing the insulation. In rejecting this argument, the court looked to the plain language of the statute which shielded those who simply furnished materials from long-term liabilities.

The court also considered and rejected Plaintiff's argument that the statute of repose violated the right to remedy clause of the Wisconsin Constitution, and the equal protection clauses of the US Constitution and the Wisconsin Constitution. The plaintiff argued that application of the statute of repose took away the rights of an individual with injuries due to asbestos exposure before those injuries could manifest. Plaintiff further argued that the statute of repose created a class of plaintiffs with asbestos-related injuries that take years to manifest, and excluded their claims. The court noted that the statute of repose was a policy choice made by the Wisconsin legislature that extinguished the right of recovery altogether at the end of the repose period, did not violate the right to remedy clause, and did not carve out an exception for latent diseases.

Read the full case decision here.

Vexing Statute of Repose Question Sent to Massachusetts Supreme Judicial Court

(U.S. District Court, District of Massachusetts, May 14, 2018)

The plaintiffs sued multiple defendants in the United States District Court, District of Massachusetts, alleging that the plaintiffs' decedent, Wayne Oliver, was exposed to asbestos during the construction of two nuclear power plants. Defendant General Electric (GE) filed a motion for summary judgment on counts I,II,IX, and X in the plaintiffs' Third Amended complaint; both parties agreed that the affected counts were governed by the substantive law of the Commonwealth of Massachusetts.

GE invoked the Massachusetts statute of repose for improvements to real property, and the court stated that although the GE turbine-generators at issue, including their insulation materials, were improvements to real property under the statute, "the more vexing is the question whether the statute of repose applies in the context of a contractor like GE's asbestos-related work." The court found the issue vexing because GE had control of the site at the time of Oliver's alleged exposure, conducted regular on-site maintenance and inspections for at least two decades after the construction was complete, and continued to be present to perform refueling outages every 18 months.

The District Court held that GE was not entitled to the protection of the statute and denied the motion for summary judgment. The court also noted that the Massachusetts Supreme Judicial Court "has not considered the application of the statute of repose to asbestos claims" and that the matter "presents a state law issue without controlling precedent whose resolution may be determinative."

GE moved the District Court to certify its appeal to the United States Courts of Appeals for the First Circuit; the plaintiffs opposed but in the event of an appeal being granted, requested that the appeal be certified to the Massachusetts Supreme Judicial Court.

The District Court held that the case should be certified to the Massachusetts Supreme Judicial Court to determine the following: "whether or not the Massachusetts statute of repose can be applied to bar personal injury claims arising from

diseases with extended latency periods, such as those associated with asbestos exposure, where the defendants had knowing control of the instrumentality of injury at the time of exposure."

Read the full decision here.

Maryland's Court of Appeals Rules on Applicability of Statute of Repose
(Court of Appeals of Maryland, April 24, 2018)

The Maryland Court of Appeals reversed the decision of the Court of Special Appeals in the matter of ***Duffy v. CBS Corporation***, making two holdings relating to Maryland's Statute of Repose. First, the court held that an injury related to asbestos exposure that underlies a cause of action for personal injury or wrongful death arises at the time of exposure. The court held that the "exposure approach," as adopted by the Court in ***John Crane Inc. v. Scribner***, 369 Md. 369, 383, 800 A.2d 727, 735 (2002), was applicable to determine if a party's injuries or cause of action arose prior to the enactment of the statute of repose. Second, the court held that the estate's causes of action were not barred by the statute of repose because the decedent's injuries or causes of action arose from his unknowing exposure to asbestos, between May 3, 1970 and June 28, 1970, a period of time before the statute of repose was enacted. Further, as a matter of law, the court held that the statute of repose does not apply if the injury or the "last exposure undisputedly was before" the effective date of the statute.

Read the full decision here.

Other Statue and Repose Decisions

- Maritime/ Admiralty Law Decisions
    - **Federal Court Denies Summary Judgment Under Massachusetts Statute of Repose, But Grants Defendants' Motions on Other Grounds**
      (U.S. District Court for the District of Massachusetts, March 30, 2018)

Summary Judgement Decisions

Plant Walkthroughs Insufficient to Establish Causation against Construction and Insulation Defendants

(United States District Court M.D. North Carolina, December 11, 2018)

In granting summary judgment for Daniel International Corporation and Covil Corporation, a district court judge in North Carolina determined that the plaintiff's causation evidence was insufficient to meet the frequency, regularity, and proximity standards of the jurisdiction. In 1965, Daniel constructed a polyester production facility for Fiber Industries, a/k/a Hoechst Celanese, in Salisbury North Carolina, and kept workers on site for maintenance following completion of the construction. Covil supplied asbestos-containing insulation for the facility.

Decedent Charles Connor worked at the site from 1966-1982, largely as a training and development supervisor. Plaintiff alleged that Connor was exposed to asbestos through his work at Fiber Industries, causing his fatal mesothelioma. Witness testimony established that Connor periodically walked through production facilities where Daniel employees worked with Covil insulation, and that he observed them doing their work, but that he primarily worked 200 feet away in a separate building. The court concluded that this testimony was insufficient to establish causation, as it did not "introduce evidence of Mr. Connor's exposure to an asbestos-containing product, for which Covil and Daniel are liable, 'over some extended period of time in proximity to where [Mr. Connor] actually worked.'"

Manufacturer's Argument that Asbestos Not Present in Its Baby Powder Fails Due to Conflicting Expert Reports

(Supreme Court of New York, New York County, November 30, 2018)

The plaintiff Anna Zoas sued Johnson & Johnson (J&J) alleging that her mesothelioma was caused by asbestos present in J&J Baby Powder. She allegedly used the product daily from 1945 to 1948 and regularly from 1948 to 1956. The plaintiff's complaint was filed on May 12, 2017, and was amended on July 4, 2017. J&J then moved for summary judgment to dismiss the plaintiff's claims.

To prevail on a summary judgment motion in New York, a defendant must make a ***prima facie*** showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact. J&J cited to the plaintiff's expert testimony and argued that the plaintiff was not expected to present any legally sufficient and admissible evidence of exposure to asbestos. Although the court noted that a defendant cannot obtain summary judgment simply by "pointing to gaps in the plaintiffs' proofs," J&J nevertheless argued that they were entitled to summary judgment on the plaintiff's strict liability claim due to a lack of causation. J&J argued that there was no asbestos contamination from their products for numerous reasons, and that its experts demonstrate that the plaintiff was not exposed to asbestos through the use of their products.

The plaintiff rebutted this argument by stating that the defense experts have not "unequivocally" established that their products could not have contributed to the causation of the plaintiff's injury. After a thorough analysis of the opinions offered by each party's experts, the court noted that based upon the conflicting expert opinions, the reasonable inference standard and construing the evidence in a light most favorable to the plaintiff, the motion for summary judgment should be denied.

Read the full case decision here.

Prescriptive Statute of Limitation Period Leads to Grant of Summary Judgment in Favor of Shipyard Defendant

The plaintiff filed suit against several defendants including Huntington Ingalls (Avondale) and Kaiser Gypsum (Kaiser) alleging her mother, Dolores Punch, developed and passed from mesothelioma as a result of exposure to asbestos for which the defendants were liable. Specifically, the plaintiff alleged that her decedent was exposed to asbestos fibers from washing the laundry of her husband who had worked as a pipe fitter at Avondale from 1948-1960. The plaintiff later amended her complaint to include exposure from the work clothes of her son who also worked as a helper and pipe fitter at Avondale from 1976-1979. Ms. Punch passed away on August 15, 2011. Her complaint was not filed until June 8, 2017.

Avondale removed the case to the United States District Court and the plaintiff moved to remand. The remand was denied. The defendants then moved for summary judgment arguing that the plaintiff's claims were barred by prescription. The plaintiff countered that the doctrine of Contra Non Valentem applied because “prescription does not run against a person who could not bring his suit.” The plaintiff argued that Contra Non Valentem applied in this matter for two reasons: 1) the discovery rule and 2) the concealment rule. The court began its analysis and stated that summary

judgment is appropriate where the movant shows that there is no dispute as to material fact. The plaintiff's claims were based in Louisiana's wrongful death and survival claims statute. That statute mandated a prescriptive period for asserting claims within one year from the death of a decedent. Here, The plaintiff waited years beyond the prescriptive period to file her complaint. The plaintiff claimed she didn't know that asbestos caused mesothelioma until 2017. The court was not persuaded by the plaintiff's argument. The discovery rule provided that, in extreme cases, prescription commences when the plaintiff should have known facts that would give rise to her cause of action. The court noted that the plaintiff's own complaint alleged that the causal connection between exposure to asbestos and mesothelioma was known in the 1960's. Additionally, The plaintiff testified that her father and brother were employed at Avondale and that "everyone was exposed to asbestos when working at Avondale." The court could only conclude that the plaintiff's own neglect resulted in the timing of the filing. The court was equally unpersuaded by that the plaintiff's claims were not prescribed under the concealment rule. Here, the plaintiff simply provided nothing to illustrate that Avondale canceled anything from her to prevent the timely filing. Accordingly, the court dismissed the case and entered summary judgment.

Summary Judgment in Favor of Bankrupt Wisconsin Company Affirmed on Statute of Limitations Grounds

(California Court of Appeal, First District, November 26, 2018)

Plaintiff David Hart appealed the entry of summary judgment in favor of Special Electric Company on the basis that the claims against the company were time-barred under Wisconsin law. The plaintiff sued Special Electric alleging that his mesothelioma was caused by exposure to asbestos from products supplied by the company.

Special Electric, a Wisconsin corporation, filed for bankruptcy under Chapter 11 in 2004, and by 2006, a plan of reorganization had been entered. By then, all of the company's assets had been sold and it had no operations, officers or directors. Its lone employee served as its post-bankruptcy director and president. The company was administratively dissolved in 2012, pursuant to Wisconsin law, after failing to submit the required annual reports and fees. On May 8, 2014, the company's insurers published a Notice of Dissolution in three Wisconsin newspapers stating that a two year statute for claims against Special Electric would expire in May 2016. The plaintiff was diagnosed with mesothelioma in late 2015. He filed suit approximately four months after the claims period in the Notice of Dissolution had expired. Summary judgment was granted on the basis that the Notice of Dissolution was sufficient under Wisconsin law and the claim was therefore time-barred.

On appeal, the plaintiff argued that the statute of limitations was preempted by Special Electric's bankruptcy reorganization plan. The court found this argument unpersuasive since the plan specifically allowed for the application of state law. The plaintiff also argued that the Notice of Dissolution was insufficient under Wisconsin law. The court analyzed the Notice, and found that the bankruptcy reorganization plan permitted such notice, and further, required Special Electric's insurers to defend against unliquidated personal injury claims. The plaintiff also argued that the Notice of Dissolution failed to include the type of information that must be included in a claim, but the court found this defect to be not fundamental. The court concluded that this technical defect did not prejudice plaintiff, and affirmed the entry of summary judgment in favor of Special Electric.

Read the full decision here.

South Carolina Workers Compensation Statute of Repose Bars Claims for Latent Asbestos Diseases

(United States District Court, D. South Carolina, Florence Division. November 13, 2018)

A federal court in South Carolina granted the summary judgment motion of defendant E.I. du Pont de Nemours and Company (DuPont) on the theory that DuPont was a statutory employer, and South Carolina Workers Compensation law provided the exclusive remedy for the plaintiff. For at least two years in the 1960s, decedent Jerry Matthews worked as an insulator for Armstrong Contracting & Supply Company at DuPont facilities in South Carolina, where he alleged he was exposed to asbestos insulation that caused his fatal lung cancer. At that time, DuPont had its own construction division that employed its own craftsmen of various types, including insulators. However, DuPont also contracted with various outfits for additional construction services.

In support of DuPont's argument that it was a statutory employer, a former field project manager testified that pipe insulation was a normal part of DuPont's business activities, and that craftwork performed by contractors at DuPont was directly related and important to DuPont's ongoing business activities. The court concluded that through this evidence, DuPont sufficiently satisfied requirements that a statutory employee's activities were: 1) an important part of

the owner's business or trade; 2) a necessary, essential, and integral part of the owner's trade; business, or occupation; or 3) identical to activities performed by the owner's employees.

Complicating the analysis was South Carolina's Workers Compensation Act, which stated in section 42-11-70 that "(n)either an employee nor his dependents shall be entitled to compensation for disability or death from an occupational disease…unless such disease was contracted within one year after the last exposure…save that in the case of a pulmonary disease arising out of the inhalation or organic or inorganic dusts, the period shall be two years." The court considered plaintiff's arguments that this statute of repose provision ***excludes*** pulmonary diseases from the reach of the Act, making a civil suit the only option. The court rejected these arguments, and determined that the provision ***extinguishes*** a right to compensation for pulmonary diseases - like decedent's lung cancer **-** which have a latency period for longer than two years. The court acknowledged that its ruling left Plaintiff without a remedy against DuPont, but pointed to the legislature's clear intent to provide a finite point at which an employer's liability ends.

Read the full case decision here.

Submission of Conflicting Expert Reports Leads to Denial of Summary Judgment in Talcum Powder Case

The plaintiff Donna Olson filed suit against the defendants Johnson and Johnson and Johnson and Johnson Consumer Inc. (defendants) alleging she developed pleural mesothelioma as a result of exposure to cosmetic talcum powder, including baby powder and Shower to Shower from 1953-2015. Additionally, the plaintiff claimed exposure from her mother's application of the same. Ms. Olson stated in deposition testimony that there were no warnings. However, she conceded that she heard about a "possible link to ovarian cancer" in 2015. The defendants moved for summary judgment.

The court began its analysis and reminded that summary judgment is appropriate when all material issues of fact are eliminated. The defendants argued that the plaintiffs had not presented any evidence of exposure to asbestos. Specifically, the defendants argued they were entitled to summary judgment as the plaintiff lacked proof of causation because "1) the talc was sourced from asbestos free mines 2) the mined talc was purified 3) there were internal tests to ensure the lack of contamination 4) both government and independent tests confirmed the product was asbestos free." Moreover, the defendants believed that their experts had proven that Ms. Olson had not been exposed to asbestos through the use of talc. The court was not persuaded and noted that "pointing to gaps in the plaintiff's proof" is not sufficient to grant summary judgment.

Expert affidavits were provided by Dana Hollins, Michael Peterson, and Matthew Sanchez. As for Certified Industrial Hygienist, Ms. Hollins, the court noted that her affidavit failed to "unequivocally establish lack of causation" particularly because it lacked scientific foundation. Additionally, her affidavit failed to prove that the defendants' products did not contribute to causation of Ms. Olson's injury.

As for toxicologist, Michael Peterson, the court found that his statements regarding epidemiologic data to contradict Ms. Hollins "reference to numerous published and unpublished studies." Mr. Peterson's statements that Ms. Olsen's mesothelioma was likely caused by some other "origin" was determined to be conclusory as no mathematical analysis was including to account for the ***actual exposure.***

Matthew Sanchez provided a report regarding the geologic characteristics of talc. Specifically, he concluded that the talc supplied by the defendants did not contain asbestos. However, the court took exception with the fact that Dr. Sanchez's report referred to studies and testing outside with samples not relevant to Ms. Olsen's exposure time frame. The court concluded that all the defendants' experts failed to establish without question that the defendants products did not contribute to the causation of Ms. Olsen's injury.

The plaintiff's experts Dr. Moline, Dr. Compton, Dr. Longo and Dr. Finkelstein submitted the following in the plaintiff's opposition to the defendants' motion for summary judgment.

The defendants took the position that Dr. Moline was discredited in the ***Juni*** decision. That decision involved Dr. Moline's opinion with respect to the plaintiff's exposure in brake dust and the lack of causation because she couldn't tell whether the asbestos fibers were "active after the braking process." However, the court noted the instant case was different because the plaintiff alleges exposure only to talc. Here, Dr. Moline's report relied on other reports and studies which postulated that small amounts of asbestos were sufficient to cause disease. Moreover, the reports relied upon data suggesting talc was in the defendants' products. Accordingly, an issue of fact was raised by the plaintiff as to causation.

Medical doctor Murray Finkelstein submitted an affidavit which "incorporates relevant portions of multiple studies of talc and his own comparison and scientific modeling of Donna Olsen's exposure." The court was persuaded that his report established an issue of fact as to causation vis a vis Ms. Olsen's exposure.

As for Dr. Compton, the court concluded that his report that "aerosolization of the consumer talc products containing the samples would have elevated concentrations of asbestos fibers." Therefore, a material issue of fact has been presented by the plaintiff. Dr. Longo's report also created an issue of fact according to the court because some of his testing involved samples from after the plaintiff's exposure timeframe.

Noting the "drastic" nature of summary judgment and the conflicting defendant reports, the court denied summary judgment as to strict liability and negligence. The court dismissed the plaintiff's cause of action for fraud and civil conspiracy. However, the court found that the plaintiff had raised issues of fact regarding her claims for punitive damages.

Apparent Manufacturer Theory of Liability Upheld for Subsidiary Insulation Cement Manufacturer

(Washington Supreme Court, November 1, 2018)

In a case of first impression, the Washington Supreme Court adopted Section 400 of the Restatement (Second) Torts, recognizing a manufacturer's liability for claims arising prior to the 1981 Product Liability and Tort Reform Act, and assessing such liability by applying the objective reliance test, which requires viewing all of a defendant's relevant representations from the perspective of the ordinary, reasonable consumer, finding that a Court of Appeals Panel had erred in holding that objective reliance be judged only from the perspective of a sophisticated industrial purchaser of asbestos products. Finding that the plaintiff presented sufficient evidence demonstrating an issue of material fact as to whether reasonable consumers could conclude that Pfizer was an "apparent manufacturer" of an asbestos product that allegedly caused Vernon Rublee's (Mr. Rublee) illness and death, the Supreme Court reversed the Court of Appeals and remanded for further proceedings.

The plaintiff Margaret Rublee (Plaintiff) and Mr. Rublee filed a personal injury action against multiple defendants, including Pfizer, for damages relating to asbestos exposure throughout Mr. Rublee's employment at the Puget Sound Naval Shipyard (PSNS). Pfizer was named as a defendant pursuant to the "apparent manufacturer" theory found in Section 400 of the Restatement (Second), upon the claim that liability could be imposed upon Pfizer since it represented itself as a manufacturer of the asbestos-containing products that allegedly caused Mr. Rublee's mesothelioma. Specifically, Quigley, which manufactured insulation cement, was a subsidiary of Pfizer during the relevant time period, a fact noticeably discerned not only from promotional materials, stationery, invoices, and data sheets, all of which contained both company logos and names, but also from the bag of insulation cement itself, which identified Quigley as the manufacturer and Pfizer as the parent company. Pfizer moved for summary judgment after on the ground that the plaintiff could not establish apparent manufacturer liability.

Although Quigley had previously filed for bankruptcy, which barred the plaintiffs from asserting asbestos-related claims against Pfizer on successor liability grounds, the trial court found that Quigley's applicable bankruptcy trust injunction does not bar suits based on the "apparent manufacturer" theory found in the Restatement. The trial court, however, went on to grant Pfizer's motion, concluding that "a reasonable purchaser would not have been induced to believe that Pfizer was such apparent manufacturer of the injurious products within the meaning of [Section 400 of the Restatement (Second)]." Since the scope and interpretation of Section 400 presented questions of first impression in Washington State, the trial court certified the case for discretionary review.

A Court of Appeals Panel affirmed the trial court, holding that there was no issue of material fact as to Pfizer's status as an apparent manufacturer. The Panel held that the plaintiff failed to establish an issue of material fact under any of three tests courts apply when determining apparent manufacturer liability: objective reliance, actual reliance, or enterprise liability, and therefore declined to decide which of the three tests the Washington Supreme Court would adopt thereon in. With particular regard to objective reliance, however, the Panel held that apparent manufacturer liability should be viewed from the perspective of a sophisticated user or commercial purchaser of asbestos products rather than the viewpoint of an ordinary consumer or end-user such as Mr. Rublee. After another Pfizer win, the plaintiff petitioned the Washington Court of Appeals, arguing that the Court of Appeals Panel erred in holding that objective reliance be judged only from the perspective of a sophisticated industrial purchaser of asbestos products.

The Washington Court of Appeals confirmed that Washington State should accept and adopt apparent manufacturer liability for claims arising prior to the 1981 Product Liability and Tort Reform Act. The Court further went on to agree with the plaintiff and hold that Courts should apply the objective reliance test when determining apparent manufacturer liability, and consider all of the defendant's relevant representations from the perspective of an "ordinary, reasonable

consumer." The Court reasoned that this is consistent with the Court's general approach in products lability cases of looking at the "reasonable expectations of ordinary users and consumers, not the particular plaintiff." Moreover, the Court of Appeals found that the "sophisticated purchaser" viewpoint is inconsistent with Washington law since courts have long recognized that consumer protection is the touchstone of Washington's products liability law.

Concluding that Pfizer's reliance on the "sophisticated purchaser or informed user" approach to apparent manufacturer liability was inconsistent with its findings, and finding compelling the conjunction of Quigley and Pfizer's names on promotional materials, stationery, invoices, data sheets, and the insulating cement at issue used by Mr. Rublee, the Court of Appeals held that there was a material issue of fact as to whether Pfizer could be held liable under the apparent manufacturer doctrine.

Lack of Successor Liability Leads to Grant of Summary Judgment for Shipping Defendant

(United States District Court, W.D. Washington. October 25, 2018)

The plaintiffs filed suit against Maersk Line alleging their decedent, Mr. Klopman-Baerselman, was exposed to asbestos from 1955-1959 while working as a merchant marine onboard the Rotterdam Lloyd. The plaintiffs named Maersk as a successor in interest to the Royal Rotterdam Lloyd. The defendant moved for summary judgment arguing that it had no connection to the Rotterdam Lloyd. The plaintiff sought discovery including the deposition of Defendant's corporate representative Steven Hadder. In the meantime, The defendants removed the case and Maersk moved for summary judgment again. The plaintiff opposed stating that more time was needed to conduct discovery. The court denied the motion giving the plaintiff the benefit of discovery. However, the court noted that plaintiff had ignored the successor in interest challenge thus far.

Discovery continued and the defendant alerted the plaintiff of the successor in interest challenge by letter again. Specifically, counsel informed the plaintiff that Rotterdam Lloyd ceased operations in 1970 and retained its own liabilities in 2000. the plaintiffs deposed the defendant's corporate representative. From that deposition, the plaintiffs wanted to depose a self-employed Dutch attorney, Daniel Sikkens. to explore the successor issue. the plaintiffs submitted a declaration of intent to continue discovery. Maersk sought summary judgment and argued that the plaintiff had not put forth anything regarding a material fact on the successor in interest challenge. The court reminded the standard for summary and stated that continuing summary judgment is warranted "upon a good faith showing by affidavit that the continuance is needed to obtain facts essential to preclude summary judgment." Here, the court quickly concluded that The defendant's motion should be granted. According to the court, the plaintiff had not put forth any showing of fact as to whether the defendant is the successor in interest to Rotterdam Lloyd. Moreover, the plaintiff had an opportunity for discovery and Mr. Sikken's deposition could have already been taken. Accordingly, summary judgment was entered.

Read the full case decision here.

Applying Washington Law to Summary Judgment Based on Government Contractor Defense for Pump Manufacturer Results in Denial of Motion

(United States District Court, Western District of Washington, October 9, 2018)

The court ruled on competing motions for summary judgment from the plaintiff Alice Mikelsen and the defendant Warren Pumps in this case involving allegations that Arthur Mikelsen developed mesothelioma from working around Warren Pumps in the machine shop at Puget Sound Naval Shipyard from 1942 to 1980. The plaintiff challenged six of Warren Pumps' affirmative defenses; the court granted five of the six, eliminating the defenses of failure to mitigate, contributory negligence, assumption of risk, sophisticated purchaser, and intervening/superseding cause. The court denied summary judgment on the plaintiff's challenge of Warren's government contractor affirmative defense, finding disputed facts regarding whether the Navy's specifications and regulations precluded Warren from satisfying its state law duty to warn.

Regarding Warren's summary judgment motion based upon the government contractor theory, the court declined to apply maritime law and denied this motion. Under Washington law, Plaintiff demonstrated facts sufficient to demonstrate potential causation, even though there was no testimony that Mr. Mikelsen worked directly with a Warren Pump. The court noted that Warren supplied a significant number of pumps to the Navy, Mikelsen worked in the space where those pumps were present, the pumps were used in a manner that created dust, and Mikelsen was in the range of this dust. The court held that Warren did not show as a matter of law that the Navy had reasonably precise specifications regarding warnings and labeling that precluded Warren from complying with their state law duties.

The order denying the defendants motion for summary judgement can be found here.

The order granting in part the plaintiffs motion for summary judgement can be found here.

Lack of Exposure Evidence Leads to Grant of Summary Judgment for Railroad Defendant

(U.S. District Courtm D. Idaho, October 1, 2018)

The plaintiffs filed suit against Union Pacific Railroad (Union Pacific) alleging that Rollie Stephens had brought asbestos home on his work clothes which caused his son, William, to develop mesothelioma. Specifically, the plaintiffs argued that Rollie Stephens was exposed to asbestos from his work at the Weiser roundhouse working on steam locomotives that contained insulation. Union Pacific moved for judgment as a matter of law. The plaintiff moved for summary judgment as to affirmative defenses.

The court began its analysis with the standard for summary judgment and stated that "summary judgment is appropriate where a party can show that, as to any claim or defense, there is no genuine dispute as to any material fact." Union Pacific began its argument that it was entitled to judgment as a matter of law because the Locomotive Inspection Act (LIA) barred the plaintiffs' claims. The parties agreed that the decision in the recent ***Kurns*** opinion was critical to the court's analysis. ***Kurns*** dealt with a machinist railroader in state law defective design and failure to warn claims. According to the court, the question for the court was whether the plaintiffs' claims were directed toward exposure from locomotive equipment. Notably, negligence was not the basis for liability under the LIA according to the court. On its face, the Stephens' claims is subject to the LIA and the defendant would be entitled to judgment as a matter of law. However, Union Pacific had not raised pre-emption as a defense and therefore waived it according to the court.

The court then moved to Union Pacific's motion for summary judgment. The court immediately noted that the plaintiffs must prove exposure in order to survive summary judgment. In the instant matter, only William Stephens was able to provide some evidence as to potential exposure. Here, Mr. Stephens could not testify as to products or materials that his dad may have worked with or around. Accordingly, The plaintiff could not sustain their burden under Idaho's substantial factor test. Summary judgment was therefore appropriate for Union Pacific.

Read the full case decision here.

Defendant's Motion for Summary Judgment in Talc Case Granted Based upon Lack of Causation Evidence

(U.S.D.C. for the Southern District of Georgia, September 28, 2018)

The plaintiff, Sharon Hanson, used Colgate Palmolive's Cashmere Bouquet talcum powder product for 12 years, from 1961 to 1973. She was later diagnosed with both ovarian cancer and mesothelioma, and passed in April 2018. On September 15, 2017, Colgate moved for summary judgment and also later filed Daubert motions to preclude plaintiff's four causation experts. On September 24, 2018, the court entered an order excluding the opinions of each of those experts.

Colgate's motion for summary judgment argued that 1) the plaintiff had no evidence that the Cashmere Bouquet product contained asbestos; and 2) assuming the product did contain asbestos, plaintiff had no evidence as to the amount of exposure to that asbestos. In order to survive summary judgment under Georgia law, the plaintiff had to prove that she was actually exposed to asbestos and that the amount of exposure was greater than de minimis. After a thorough review of the record concerning product testing, the court concluded that the plaintiff was unable to demonstrate that the Cashmere Bouquet product which she used contained asbestos. There was no evidence that the plaintiff's expert tested a Cashmere Bouquet product from the 1961 to 1973 timeframe, or tested a sample that the plaintiff actually used.

If the court were to accept the plaintiff's argument, the jury would be allowed to find liability against Colgate on the following basis: 1) a product sometimes contains asbestos; 2) the plaintiff used the product in question; 3) asbestos causes mesothelioma; 4) the plaintiff contracted mesothelioma; and 5) therefore, the product caused mesothelioma. Such reasoning does not comport with Georgia law requiring a plaintiff to show actual exposure to satisfy the specific causation requirement.

The court also addressed the alternative argument addressing if the product did contain asbestos. The court found that Colgate demonstrated that there is no evidence regarding the level of plaintiff's asbestos exposure and the contribution of the Cashmere Bouquet product to the plaintiff's mesothelioma and ovarian cancer. For those reasons, Colgate's motion for summary judgment was granted.

Read the full case decision here.

Plaintiffs' Causation Experts Stricken Under Daubert; Defendants' Motions for Summary Judgment Granted

(United States District Court, Middle District of Florida, September 25, 2018)

The plaintiff's Decedent Richard Doolin was diagnosed with mesothelioma in June of 2013 and passed away as a result on June 22, 2014. The plaintiff Stacey Doolin filed suit against multiple companies, alleging that Richard was exposed to asbestos when visiting his father's automotive workshop as a child. The plaintiff further alleged that Richard did shadetree automotive work throughout his life that also exposed him to asbestos. The last remaining defendants were Ford Motor Company (Ford) and Pneumo Abex LLC (Abex).

Ford and Abex filed several ***Daubert*** motions seeking to exclude the testimony of various experts, as well as motions for summary judgment. The court first determined that the dispositive issue in the case "is that of causation." The defendants filed motions to exclude the opinions of plaintiffs' causation experts, Arnold R. Brody, Ph.D., and Richard L. Kradin, M.D., D.T.M. & H.. After considering the record and the arguments of the parties, the court held that the expert testimony on specific causation lacked reliability under ***Daubert***, and therefore they were excluded.

The court then turned to the motions for summary judgment of defendants. In light of the conclusion that plaintiffs' experts on causation were excluded, and given the absence of any reliable testimony on the issue of specific causation, the Court held that Plaintiff failed to demonstrate an issue of material fact on causation, and therefore, summary judgment was ordered in favor of Ford and Abex.

Read the full case decision here.

Summary Judgment Denied With Respect to Valve and Pump Exposure

(U.S. District Court for the Eastern District of North Carolina, September 21, 2018)

The plaintiff, Wade Gore, was diagnosed with mesothelioma in May 2015 and filed suit a month later. He alleged asbestos exposure while working at a DuPont plant in Leland, North Carolina. Gore worked as an insulator, with pipes, pumps and valves from approximately 1975 to the 1980s. He was allegedly exposed to asbestos from gaskets, pumps, valves and packing. Numerous defendants filed motions for summary judgment based upon a purported lack of evidence of exposure.

With respect to defendant Powell, the court denied the summary judgment motion, finding there was evidence that the plaintiff personally worked on Powell valves in 1975 and 1976. For Flowserve, the court denied the motion for summary judgment with respect to Flowserve's Durco products. However, the court found there was no evidence that the plaintiff ever worked with Flowserve's Valtek products, and granted the motion for summary judgment with respect to those products. John Crane's motion for summary judgment was denied based upon evidence showing the plaintiff worked with two types of John Crane gaskets. Both Flowserve and John Crane also moved to dismiss the plaintiff's claim for punitive damages at the summary judgment stage. The court granted the motion with respect to Flowserve, but denied it as to John Crane, finding a genuine issue of material fact with regard to that company's knowledge of the hazards of asbestos.

Finally, the court denied four motions in limine regarding expert testimony, two of which were filed by plaintiff and two of which were filed by the defense.

Read the full case decision here.

Multiple Motions for Summary Judgment and Affirmative Defenses of Railroad and Auto Parts Manufacturers Denied in Part and Granted in Part

(United States District Court, W.D. Washington. September 17, 2018)

The plaintiff Patrick Jack filed suit against several defendants alleging he contracted mesothelioma from take-home, bystander and direct exposure to asbestos for which the defendants were liable. The plaintiff's take-home and bystander exposure was alleged from his father's work at Union Pacific. He also claimed exposure while serving as a machinist in the Naval Reserve and Navy from 1955-1962 and while working as a machinist at the Puget Sound Naval Shipyard. Also, The plaintiff contended that he was exposed to asbestos while working as a professional mechanic and during personal auto work.

The court's analysis started with the standard for secondary exposure claims. According to the court, secondary exposure claims are recognized under a theory of negligence. Foreseeability is a component of the theory according to the court. Here, Union Pacific argued that the "risk of developing mesothelioma from secondary asbestos exposure was not foreseeable" prior to 1955. The plaintiff testified that 1955 was the last year he would have been exposed from his father's work clothes at home. The plaintiff countered the defendants' position and stated that "harm is foreseeable if the risk from which it results was known or in the exercise of reasonable care should have been known." However, the Court recognized that the plaintiff's expert, Dr. Castleman, conceded that Union Pacific would have found "practically nothing" regarding the hazards of secondary exposure had it wanted to look. Accordingly, the court granted summary judgment as to take-home exposure in favor of Union Pacific.

Union Pacific, Ford and Borg Warner moved for summary judgment as to exposure and causation.

Union Pacific- Union Pacific moved for summary judgment as to the plaintiff's bystander claims. The plaintiff had testified that he was exposed to asbestos while visiting his father at work at Union Pacific. However, Union Pacific argued that the plaintiff failed to establish that the plaintiff was actually exposed to any asbestos during those visits. The plaintiff relied on his expert, Dr. Brodkin, who utilized a report from the early 1980's that illustrated the use of asbestos in cement pipes and insulation in certain rail systems. The court quickly concluded this reliance did not rise to the level to support the plaintiff's assertion of bystander exposure. Consequently, Union Pacific's motion for summary judgment as to bystander exposure was granted.

Ford-Ford moved for partial summary judgment arguing that only certain alleged exposures to Ford products at Apex Mobile Towing and removal of brakes from a Ford Mustang should be submitted to the jury. The plaintiff took the position that several other exposures should be included, including clutch installations at the Dexter garage. The court disagreed with the plaintiff as Dr. Brodkin opined that the clutch installation would have created a de minimus exposure to asbestos. The real source of exposure from clutches would have been from removal according to the plaintiff's expert. Accordingly, the court granted Ford's motion for partial summary judgment as to the plaintiff's installation of clutches at Dexter. Ford 's motion for summary judgment as to brake exposure was denied. Here, ample evidence of exposure to several vehicles including a race car were present.

Borg Warner-Borg Warner sought summary judgment arguing that the plaintiff was not exposed to its products or in the alternative, any exposure was not a contributing factor in Mr. Jack's development of mesothelioma. The Court noted three potential sources of exposure from Borg Warner products. Those sources were installation of clutches, removal of clutches and the use of Borg Warner brakes on a Pontiac. Interestingly, the court noted the lack of clarity of the deposition record whereby the term "clutch work" or "clutch job" was used. These terms lacked clarity to whether the deponent meant installation or removal. According to the court, the distinction is important as the plaintiff's expert had testified that installation created only a de mimimus exposure. The plaintiff had testified that he may have installed 10 or more clutches while working as a professional mechanic. However, the record lacked evidence of abrading or sanding the clutches. Therefore, Borg Warner was entitled to summary judgment as to installation. The court was more troubled by removal of clutches. The plaintiff furnished evidence that Borg Warner supplied clutches to a Chevy on which the plaintiff performed work. However, evidence that the clutch on the Chevy was original was lacking. After further review, the court noted that a factfinder could infer that the plaintiff was exposed to a Borg Warner clutch from the race car. Accordingly, summary judgment was not appropriate for removal. The court also granted Borg Warner's motion for summary judgment as to brakes as the plaintiff offered no evidence that Borg Warner manufactured or sold asbestos containing brakes during the time period in question.

Borg Warner also argued that plaintiff could not establish that any exposure to its clutches was a substantial factor in causing Plaintiff's mesothelioma. Relying on the ***Lockwood*** case, the Court disagreed and stated that proximity and closed nature of the work environment (under the car) were met. Although the extent of time spent was not clear, the Court pointed out that the work continued over several decades. Consequently, the Court denied Borg Warner's motion as to causation for on clutch removal.

Loss of Consortium-The parties argued whether Ms. Jack could bring a claim for loss of consortium. Ford and Borg Warner argued that the spouse should not be permitted to sustain her loss of consortium claim because she married Mr. Jack after his diagnosis. According to the defendants, Washington law precludes recovery for loss of consortium where the "injury precedes that caused the loss precedes the marriage." After a lengthy analysis, the court concluded that ambiguity in the wrongful death statute permits Ms. Jack to sustain her loss of consortium claim from Mr. Jack's death.

The court next examined the plaintiff's various motions on affirmative defenses put forth by the defendants.

The discovery-plaintiff argued that the defendants failed to provide adequate responses to the defenses raised in their answers to interrogatories. The court quickly dispensed with the plaintiff's issue on discovery as the plaintiff did not raise the issue in a discovery motion.

Failure to Mitigate the damages-plaintiff moved for summary judgment as to the defense of failure to mitigate damages. The doctrine which "prevents recovery for those damages the injured party could have avoided by reasonable efforts taken after the wrong was committed." Borg Warner opposed the plaintiff's motion. However, the court found that Borg Warner provided nothing to show the plaintiff failed to follow "medical advice" and therefore granted the plaintiff's motion.

Learned Intermediary the doctrine-plaintiff moved for summary judgment on the learned intermediary doctrine or sophisticated user defense. Borg Warner argued that the plaintiff's employer should have been aware of the dangers of asbestos and was warned of those dangers but failed to warn thereto. The plaintiff countered and stated that Washington law does not consider the sophisticated user doctrine in asbestos litigation. After noting that most sophisticated user defenses arise in pharmaceutical cases in Washington, the court concluded that the doctrine did not apply. The court determined that Borg Warner had not offered evidence that the plaintiff encountered its products while working as a sophisticated user. Consequently, the plaintiff's motion for summary judgment as to learned intermediary doctrine was granted.

Contributory Negligence and Assumption of the Risk-The parties disagreed whether the defenses of contributory negligence and assumption of risk were available. After an analysis of the Washington Product Liability Act, the court concluded that neither the plaintiff or the defendants had determined whether the pre or post 1981 law applied. Contributory negligence is prohibited under the pre 1981 law. However, assumption of risk is available under the pre 1981 law. The court declined to rule on the motion as to contributory negligence under a theory of ***strict liability***. The motion as to both assumption of risk and contributory negligence under a ***negligence*** theory was denied. According to the court, the defendants put forth evidence that the plaintiff may have learned about the dangers of asbestos in the 1970's and therefore those defenses were plausible.

Superseding the cause-plaintiff moved for summary judgment on the affirmative defense of superseding cause. Here, the defendants took the position that Mr. Jack's exposure in the Navy was a superseding cause of his disease. The court noted that a superseding cause "breaks the chain of proximate causation." However, in order to assert the defense the defendants must show that the "exposure Mr. Jack suffered as a result of the non-party entities' conduct was so unforeseeable to absolve the defendants of their liability." The defendants failed to do so in this instance according to the court. Consequently, summary judgment was granted for the plaintiff as to superseding cause.

Read the full case decision here.

Negligence Per Se Claims against Defendant Passenger Railcar Manufacturer Denied; Strict Liability and Negligence Claims Can Proceed Under Federal Statutes

(U.S. District Court, D. Kansas, September 10, 2018)

The plaintiff Nancy Little brought an action individually and as the personal representative of the estate of her father, Robert Rabe, against defendant The Budd Company (Budd). The plaintiff alleged that her father was exposed to asbestos-containing pipe insulation while working as a pipefitter for the Atchison Topeka & Santa Fe Railroad (ATSF) between 1951 and the mid-to-late 1970's; she contends this exposure caused him to develop mesothelioma. The plaintiff's decedent passed away on December 28, 2012.

Budd allegedly manufactured passenger railcars and sold them to ATSF. The plaintiff contends that defendant placed asbestos and asbestos-containing products in its railcars, exposing her father to asbestos while working for ATSF. The plaintiff asserted the following state law claims: negligence, strict product liability design/defect, and strict product liability/warning defect. Alternatively, the plaintiff asserted a state law claim for negligence ***per se*** based on the defendant's alleged violation of two federal statues: (1) the Locomotive Inspection Act (LIA), and (2) the Federal Safety Appliance Act (SAA).

The defendant filed a Motion for Summary Judgment against all claims. The plaintiff also filed a Motion for Summary Judgment on certain elements of her claims and against some of the defendant's affirmative defenses.

Budd argued that the LIA and SAA preempt plaintiff's state law claims for negligence, strict product liability/design defect, and strict product liability/warning defect. Additionally, Budd argued that the plaintiff's alternative claim for negligence per se based on Budd's alleged violation of the two federal statutes fails as a matter of law.

The court held that the evidence creates a genuine, triable issue about whether the defective product that allegedly caused the plaintiff's decedent's death – asbestos-containing pipe insulation – is a locomotive appurtenance under the LIA, and therefore denied Budd's MSJ related to the plaintiff's state law claims based on LIA preemption.

The court deferred ruling on the SAA preemption theory until trial, giving "both parties notice and opportunity to present their arguments in the context of trial evidence." By doing so, the court provides the defendant sufficient notice and an opportunity to address the plaintiff's argument that defendant's SAA theory fails as a matter of law.

The court granted summary judgment against the plaintiff's negligence ***per se*** claim premised on defendant's violation of the LIA and SAA. "Because the two statutes did not apply to manufacturers when the plaintiff's father allegedly was exposed to asbestos-containing pipe insulation, the court cannot apply the standards contained in those statutes retroactively to impose liability on defendant in the form of a state law claim for negligence ***per se***."

Lastly, the court held that a reasonable jury could conclude that exposure to other asbestos-containing products – and not just defendant's asbestos-containing pipe insulation – were a substantial contributing factor to Mr. Rabe's death. Therefore, the court denied the plaintiff's Motion for Partial Summary Judgment against defendant's affirmative defense that asserts other asbestos exposures caused Mr. Rabe to contract mesothelioma.

Read the full case decision here.

Plaintiff's Deposition Testimony Presents Sufficient Evidence to Overcome Automobile Manufacturer's Motion for Summary Judgment

(U.S. District Court for the District of Delaware, August 15, 2018)

Plaintiffs John and Vicki DeCastro originally filed a personal injury action against multiple defendants in the Superior Court of Delaware, asserting claims arising from Mr. DeCastro's alleged harmful exposure to asbestos. The case was properly removed to Federal Court under the federal officer removal statute. Mr. Castro alleged that he developed lung cancer as a result of his exposure to asbestos during his service in the United States Air Force, civilian employment with Pacific Bell Telephone and United Airlines, and personal automotive and aircraft maintenance work. Defendant Ford subsequently filed the instant motion for summary judgment. The parties stipulated to applying California substantive law to the claims and defenses asserted in this case.

The court determined that the plaintiff presented sufficient evidence to raise a material issue of fact as to whether Ford supplied original asbestos-containing parts, and whether Mr. DeCastro was exposed to asbestos when he performed personal automotive work on the eight Ford vehicles he owned or encountered in his lifetime. While California recognized the bare metal defense, plaintiffs presented sufficient evidence to create a dispute of fact as to whether original parts and materials supplied directly by Ford were a potential source of Mr. DeCastro's exposure. Therefore, there was potentially a duty to warn based on the risks associated with the reasonably anticipated use of the manufacturer's own product.

The court additionally denied Ford's arguments related to strict liability and loss of consortium for the same reasons as stated above.

Lastly, Ford's Motion related to punitive damages was granted because, "Plaintiffs fail to present evidence sufficient to create a factual issue in dispute as to whether Ford's conduct constitutes 'oppression, fraud, or malice'."

Read the full decision here.

Summary Judgment on Civil Conspiracy Claims

(Appellate Court of Illinois, August 10, 2018)

The plaintiffs, John and Debra Jones, filed suit against Pneumo Abex LLC (Abex), Owens-Illinois, Inc. (O-I) and others, alleging John suffered from lung cancer as a result of exposure to asbestos while employed in construction. The plaintiffs alleged that Abex entered into a civil conspiracy with Johns-Manville to suppress information about the harmful health effects of asbestos. They asserted the same claim against O-I with regard to an alleged conspiracy with Owens-Corning Fiberglas Corporation (O-C). The trial court granted summary judgment for the defendants on those claims. The plaintiffs' conspiracy claim against Abex did not allege any asbestos exposure directly attributable to Abex. The plaintiffs did allege that he was exposed to Johns-Manville and O-C insulation during his construction career, which began in 1969.

On appeal, the plaintiffs argued that a genuine issue of material fact existed as to: 1) whether the defendants entered into a conspiratorial agreement to suppress or misrepresent information about the health hazards of asbestos; and 2) whether the defendants committed acts in furtherance of such an agreement. The appellate court found that the record was replete with genuine issues of material fact from which the factfinder could reasonably conclude the existence of a civil conspiracy. Specifically with regard to Abex, there was evidence that it entered into an agreement with Johns-Manville to suppress or misrepresent information regarding the health hazards of asbestos. In particular, the court focused on Abex's 1948 return, at Johns-Manville's request, of a report by Dr. Gardner regarding experiments with asbestos dust.

Similarly, the plaintiffs presented evidence that O-I began selling Kaylo insulation in 1943 and continued to do so after it received warning that it was potentially a respiratory hazard. Additional evidence indicated that O-I and O-C entered into a distributorship agreement in 1953, under which O-I continued to manufacture Kaylo and O-C distributed it. This agreement lasted until 1958 when O-I sold its Kaylo division to O-C. Evidence was presented that during those five years, no warnings were placed on Kaylo packaging and the companies advertised Kaylo as "non –toxic."

Based on this evidence, and numerous other examples of genuine issues of material fact, the court reversed the entry of summary judgment on the civil conspiracy claims.

Read the full case decision here.

Insulation Supplier Denied Summary Judgement Based On Residual Market Place Arguments

(United States District Court, M.D. North Carolina, August 8, 2018)

The plaintiff brought suit against a dozen entities alleging her decedent's exposure in the tire curing room of the Firestone factory in Wilson, North Carolina from 1975 to 1995. The plaintiff alleged that Covil Corporation was the supplier of asbestos containing pipe covering that was used to insulate steam lines located throughout the curing room. Covil moved for summary dismissal arguing that there was insufficient evidence to conclude that it was the supplier of the asbestos containing pipe covering located in the curing room. In response, the plaintiff submitted evidence that, with limited exception, Covil was the exclusive supplier of the asbestos insulation to the Firestone factory, and that a Covil invoice showed the insulation it sold was specifically intended to be installed in the tire curing room. Covil additionally contended that even if it had supplied the subject insulation, there was no evidence that it contained asbestos. In that regard, Plaintiff submitted evidence that Owens-Corning sold Kaylo brand covering to Covil in relation to the construction of the Wilson tire plant, which took place from 1973 to 1974. While the record established that Owens corning had ceased manufacturing asbestos containing Kaylo insulation in November 1972, it further established that Owens-Corning continued making sales of asbestos containing Kaylo pipe insulation for several months thereafter, and Covil's corporate representative agreed that it would have taken a year to clear out Covil's remaining inventory of asbestos containing Kaylo pipe insulation. Lastly the court noted the 1990's era abatement of pipe insulation from the curing room, as further evidence that the insulation sold by Covil contained asbestos. In the alternative Covil successfully moved to dismiss several causes of action sounding in breach of implied warranty, premises liability, negligent retention and supervision, inadequate design, loss of consortium, punitive damages, and workers compensation based claims.

Read the full case decision here.

Application of Statute of Repose Upheld for Material Supplier

(Court of Appeals of Wisconsin, August 7, 2018)

The plaintiff Thomas Mohn alleged that he developed lung cancer from exposure to asbestos while working with insulated turbine blankets supplied by defendant Sprinkmann during the construction of the Genoa power plant in the 1960s. Sprinkman filed a motion for summary judgment on statue of repose grounds, which the trial court granted. The plaintiff appealed, and the Wisconsin Appellate Court affirmed.

Wisconsin's statute of repose imposed a time limit of ten years for bringing claims related to the improvement of real property. The statute has specific language extending its protections to those involved in the "furnishing of materials for" the construction of the improvements, but left an exception which did not protect manufacturers or producers of defective materials used in the construction of real property improvements. Prior authority in Wisconsin stated that the statute of repose "protects all persons involved in the improvement to real property but does not protect individuals whose liability arises based on conduct occurring prior to or subsequent to the improvement." The plaintiff argued that the statute of repose did not apply to Sprinkmann because the insulation that it supplied was defective, not its act of

furnishing the insulation. In rejecting this argument, the court looked to the plain language of the statute which shielded those who simply furnished materials from long-term liabilities.

The court also considered and rejected Plaintiff's argument that the statute of repose violated the right to remedy clause of the Wisconsin Constitution, and the equal protection clauses of the US Constitution and the Wisconsin Constitution. The plaintiff argued that application of the statute of repose took away the rights of an individual with injuries due to asbestos exposure before those injuries could manifest. Plaintiff further argued that the statute of repose created a class of plaintiffs with asbestos-related injuries that take years to manifest, and excluded their claims. The court noted that the statute of repose was a policy choice made by the Wisconsin legislature that extinguished the right of recovery altogether at the end of the repose period, did not violate the right to remedy clause, and did not carve out an exception for latent diseases.

Read the full case decision here.

Clutch Manufacturer Cannot File Successive Summary Judgment Motions Based on New, Broader Expert Opinion

(United States District Court, N.D. Alabama, Eastern Division, August 1, 2018)

The plaintiffs Ray and Donna Franklin alleged that Mr. Franklin's death from asbestosis-related respiratory failure arose from his work with clutches manufactured by defendant Dana Corporation. The action, originally filed in Calhoun County Alabama, was removed to federal court, and was transferred to the MDL in the Eastern District of Pennsylvania. While in the MDL, Dana timely moved for summary judgment, arguing that there was insufficient evidence that Mr. Franklin had ever been exposed to asbestos from a Dana product, or that a Dana product was a substantial cause of Mr. Franklin's asbestosis. To support their arguments, they presented an expert report from industrial hygienist Gayla McCluskey, who opined that asbestos exposure from the removal of clutches would have been minimal and equivalent to background exposure. The MDL court denied this motion.

The case was remanded to the Northern District of Alabama, and Dana moved for leave to file a renewed summary judgment motion, which was denied. However, in a scheduling order, the court allowed for the parties to file dispositive motions on causation only. Following discovery, Dana filed an additional summary judgment motion, which the plaintiffs moved to strike, arguing that Dana presented the same arguments that were rejected by the MDL court. In support of its second summary judgment motion, Dana presented an expert report and testimony from industrial hygienist Mary Finn who opined that Mr. Franklin's work with Dana products did not increase his risk of developing asbestosis.

This court evaluated whether Dana could file successive motions for summary judgment based on "new" expert opinions, and whether the Northern District of Alabama should reconsider the MDL court's denial of Dana's first motion for summary judgment. The court determined that Dana could not "resurrect an already rejected argument simply by retaining a new expert to offer a more comprehensive opinion, to correct what it perceived to be the flaw in its earlier attempt at summary judgment." The court also declined Dana's request to reconsider the MDL court's denial of its earlier motion, noting the failure to present new evidence that would support reconsideration of an earlier decision.

Read the full case decision here.

PA Superior Court Affirms Entry of Summary Judgment for Three Friction Defendants

(Pennsylvania Superior Court, July 23, 2018)

The plaintiff, Sharon Gilbert, filed suit as the executive of the estate of her husband, Guy Gilbert, and in her own right, alleging decedent was exposed to asbestos while working as an auto mechanic at Alray Tire in Pittsburgh, PA from 1975 to 1985. The plaintiff alleged that such exposure caused decedent's mesothelioma. The decedent was not deposed before his death. Two witnesses, decedent's co-worker and manager at Alray, were deposed. The manager testified that Alray purchased replacement parts from several automotive suppliers, including defendants, Advance Auto Parts (Advance) and Automotive Distribution Network (Automotive). Additionally, the manager testified that he ordered parts from various local Ford dealerships. There was no specific testimony about what types of parts were ordered from these three companies. The trial court granted summary judgment as to all three defendants on the basis that the plaintiff failed to produce sufficient evidence that the decedent was exposed to asbestos from auto parts supplied, distributed or manufactured by the three defendants.

After a thorough examination of the record with regard to each of the three defendants, the Pennsylvania Superior Court affirmed the entry of summary judgment as to each. With regard to Advance, the court stated that there was no direct testimony that the decedent was exposed to an asbestos part supplied by that defendant. Therefore, even

assuming that the parts contained asbestos, a jury could not determine whether such potential exposure was substantial or ***de minimis*** without engaging in improper speculation. As such, the court affirmed summary judgment as to Advance. Based on the facts regarding the corporate history of Automotive, the court found that there was no direct evidence that Automotive was affiliated with or a successor in interest to the "Auto Parts Plus" store identified by the witness, and therefore affirmed summary judgment in favor of Automotive as well. Finally, summary judgment was affirmed in favor of Ford because both witnesses stated that they did not order parts from Ford dealerships often and neither could remember whether they ordered brakes. As such, the plaintiff failed to meet the longstanding frequency, regularity and proximity causation standard articulated by Pennsylvania courts.

Read the full case decision here.

Presence of Related Corporate Entities at Deposition Insufficient to Overcome Requirements of Notice and Opportunity to Cross-Examine

(State of New York Supreme Court, County of Monroe, July 23, 2018)

The decedent Jo Ann Shields worked for a carpet and tile store for six years in the 1970s, and alleged that exposure to vinyl asbestos tile caused her fatal mesothelioma. Among other exposures, she alleged that she was exposed to asbestos floor tile manufactured by National Floor Products Company, a now defunct entity that was a subsidiary of a French corporation called Tarkett, S.A. Prior to her passing, she gave ***de bene esse*** and discovery depositions, at which defendants Tarkett, Inc. and Domco Products Texas, Inc. participated. The defendant Tarkett Alabama, was added as a party defendant after Ms. Shields death, and they had no notice of her deposition, or opportunity to participate.

Tarkett Alabama moved for summary judgment arguing that the only evidence against it was Ms. Shields' deposition testimony which would be inadmissible at trial per New York law. Plaintiff countered by arguing that corporate entities related to Tarkett Alabama, and with similar interests and motivations, participated actively in Ms. Shields' deposition. The court granted the motion and held that Tarkett Alabama had been denied an opportunity to participate in the depositions, and that the testimony against it was inadmissible, uncorroborated hearsay.

Delaware Supreme Court Affirms No Excess Coverage in GM Asbestos Cases

(Motors Liquidation Company DIP Lenders Trust v. Allstate Ins. Co. et al., No. 381, 2017, 2018 WL 3360976 (Table) (Del. July 10, 2018))

The Delaware Supreme Court affirmed that several excess policies issues to General Motors do not provide coverage for asbestos-related and environmental claims against the company. GM purchased primary coverage from Royal Insurance Company for more than 50 years ending in 1993. Royal handled asbestos claims made under the policies during that period. The claims at issue were filed after 1993. Following declaratory judgment actions filed in both Delaware and Michigan, GM and Royal reached a settlement that released all of Royal's policies from further liability.

From 1972 on, the Royal policies included an endorsement that made them "claims-made" policies rather than "occurrence" policies. Thus, from 1972 on, the Royal policies covered only claims first made during the policy period. The court here affirmed that the claims at issue were not covered under any of the post-1971 policies. Because there was no coverage under the primary policies from 1972 on, the excess policies were not triggered. The court affirmed this holding even though some of the post-1971 excess policies included broader, occurrence-based trigger language.

As to the pre-1972 policies, the parties disagreed as to whether "pro rata" or "all sums allocation" would apply. The court affirmed that, pursuant to Michigan law, "pro rata" allocation would apply given the language of the excess policies at issue. The effect of the ruling was to grant summary judgment to the pre-1972 excess insurers.

Lack of Personal Jurisdiction over Talc Defendant Leads to Grant of Summary Judgment in *Part*

(U.S. District Court, M.D. Florida, July 10, 2018)

The plaintiff Susan Stevenson maintained suit against several defendants including Imerys Tac America Inc. (Imerys) alleging that her decedent, Judith Minneci, had developed peritoneal mesothelioma as a result of exposure to asbestos contaminated talc and talcum powder. Specifically, the plaintiff alleged that the plaintiff used Johnson and Johnson baby powder from 1942-1985.

Imerys moved for summary judgment arguing that the Court lacked personal jurisdiction over it. The plaintiff responded that two contacts between Florida and the defendant established jurisdiction. First, its predecessor was registered to do business in Florida from 1966-1978 and that predecessor had a registered agent in Miami. The plaintiff also took the position that Imerys knew or "should have known" that its talc would reach end users in Florida. The plaintiff conceded that the court lacked ***general*** jurisdiction over Imerys.

The court began its discussion by noting the standard for jurisdiction. Essentially, the court was tasked with denying the motion only if the allegations in the complaint did not rise to the level of a prima facie case for jurisdiction. Relying on ***International Shoe***, the court noted that a "defendant must have certain contacts with the forum state such that the maintenance of the suit does not offend the notions of fair play and substantial injustice." Moreover, the court honed in on whether or not the defendant intentionally availed itself to the forum state. The test for whether specific jurisdiction is determined by a three prong test: 1) whether the plaintiff's claims arise out of or relate to at least one of the defendant's contacts with the forum; 2) whether the nonresidential defendant purposefully availed himself of the privilege of conducting activities within the forum state, thus invoking the benefit of the forum state's laws; and 3) whether the exercise of personal jurisdiction comports with the traditional notions of fair play and substantial justice." As to the first prong, The plaintiff argued that the fact that the defendant's predecessor was registered and had a registered agent in Miami to do business established contacts. However, the court was not persuaded because Imerys did not supply Johnson and Johnson with talc during the years its predecessor was registered to do business in Florida. As for the second prong or whether the defendant had availed itself to the forum, the court determined that Imerys' targeting of Florida was scant at best. In fact, the plaintiff did not offer any evidence that the defendant availed itself to the "privileges of doing business in Florida." Having failed to establish the first two prongs, the court need not analysis the third. Consequently, any exercise of specific jurisdiction over the defendant would violate the due process clause. Summary judgment was therefore granted in part as to the issue of jurisdiction.

Read the full case decision here.

$650,000 Verdict Vacated Based on Lack of Evidence That Cement Manufacturer Was "Exclusive Supplier" to Boiler Company

(Superior Court of New Jersey, Appellate Division, July 9, 2018)

The plaintiff's Decedent William Condon and Plaintiff Debbie Condon originally filed suit in 2014 against 97 defendants, alleging that Decedent's exposure to asbestos from their products caused his mesothelioma. On June 19, 2014, a Law Division judge denied Defendant Pecora Corporation's motion for summary judgment. Of the defendants who settled with the plaintiff, nine did so before trial. At trial, the jury apportioned liability and damages between eleven defendants, including Pecora. **Six of the eleven defendants went to trial; the others were either granted summary judgment or dismissed from the case.** Pecora was apportioned damages of two percent of the total compensatory award of $6.5 million and punitive damages award of $1 million, which was molded to $650,000 in accordance with the punitive damages cap in New Jersey.

Pecora unsuccessfully moved for judgment notwithstanding the verdict or a new trial on March 6, 2015. That decision, like the summary judgment decision before it, was based on the judge's finding that Pecora was the "exclusive supplier" of asbestos cement used in the Burnham products to which Condon was exposed.

The Appellate Court determined that the factual finding of Pecora being the "exclusive supplier" was not supported by the record. The Appellate Court held that the sole possible link between Condon and Pecora was Burnham boilers, and the plaintiff's proofs did not establish that (1) the Burnham boilers were shipped with trim kits, and (2) those trim kits included wet cement rather than dry cement (Pecora did not manufacture dry cement). The decedent, during his deposition, could not specifically recall whether Burnham boilers came with trim kits. Furthermore, there was no evidence that even if the Burnham boilers came with trim kits, that the kits contained wet cement rather than dry cement.

The case was remanded to the trial court to grant Pecora's motion for summary judgment.

Read the full case decision here.

West Virginia Law Applied in Granting Summary Judgment Due to Speculative Testimony"

(Delaware Superior Court, June 28, 2018)

The plaintiff's decedent, Marchie Dolley, a lifetime non-smoker, passed from lung cancer. The sole product identification witness was his son, Ringo, who testified about his father's work as a truck mechanic at Ryder Truck Rental and General Truck Delivery. Ringo visited his father at the former job and later worked with him at the latter. He could not offer any specific testimony about how many times he worked on certain manufacturer's trucks at either job, or whether original or replacement parts were used.

PACCAR moved for summary judgment. The court applied West Virginia law due to the location of the exposure. No West Virginia court has addressed the issue of causation in an asbestos context. After addressing each party's arguments as to which standard would be applied, the court ruled that such a determination was inconsequential because the plaintiff failed to meet either test. The court stated that "the record does not contain any evidence of even approximate numbers of Peterbilt or Kenworth trucks on which Mr. Dolly worked at either Ryder or General Delivery, or how frequently he worked on them." Accordingly, the court found the evidence presented was speculative at best, and granted PACCAR's motion for summary judgment.

Read the full case decision here.

Delaware Take-Home Summary Judgment Reversed for Paper Manufacturers

(Supreme Court of Delaware, June 27, 2018)

Decedent Dorothy Ramsey's husband Robert Ramsey worked as a maintenance worker at Haveg Industries, Inc. from 1967 to 1992, and allegedly handled asbestos products manufactured by defendants Herty and Hollingsworth and Vose (together, the manufacturers) on a regular basis. The plaintiff alleged that Mrs. Ramsey developed her fatal lung cancer from regularly laundering Mr. Ramsey's clothes which were contaminated with asbestos dust emanating from his use of the manufacturers' products, among others. The trial court had granted the manufacturers' summary judgment motions, finding that they had no duty to warn Decedent of the dangers of asbestos pursuant to prior Delaware authority. This court reversed and remanded the grant of summary judgment.

The court reasoned that the risk of harm from washing asbestos-covered work clothing was foreseeable, and that Mrs. Ramsey had a viable claim against manufacturers who failed to warn of these harms and provide "safe laundering instructions to an employer that exposes its employees to the manufacturer's asbestos products." They acknowledged the manufacturers' "sophisticated purchaser" arguments and found further that Mrs. Ramsey's viable claims only are appropriate if the manufacturers failed to give warnings and safe laundering instructions to Mr. Ramsey's employer, who was in a better position to pass along the warnings/instructions. The ruling effectively overruled two prior Delaware Supreme Court decisions regarding take-home exposure.

Read the full case decision here.

Illinois Appellate Court Affirms Summary Judgment on Conspiracy Claims

(Appellate Court of Illinois, June 19, 2018)

The plaintiff, James Johnson, was diagnosed with asbestosis after working with insulation products in the construction industry, beginning in 1965. He filed suit against numerous defendants, and included a claim that Pneumo Abex LLC, Owens-Illinois, Inc., Metropolitan Life Insurance Company and Honeywell International, Inc. were involved in a civil conspiracy to conceal the dangers of asbestos.

The trial court thoroughly reviewed the evidence obtained during discovery and presented at hearings, including the Saranac Study, and determined there was not clear and convincing evidence to demonstrate the existence of an agreement between Pneumo Abex, Owens-Illinois and the other alleged conspirators. Accordingly, the trial court granted those two parties' summary judgment motions.

On appeal, the Appellate Court of Illinois reviewed the evidence and affirmed the finding that the plaintiff failed to present any evidence that the decision of Pneumo Abex and other companies to remove information regarding studies of mice was invalid and unlawful. Summary judgment was therefore affirmed in favor of Pneumo Abex.

With regard to Owens-Illinois, the appellate court noted that prior courts had determined that Owens-Illinois and Owens Corning Fiberglass had engaged in a conspiracy to conceal the potential dangers of Kaylo insulation, from 1953 to 1958. However, the same court also found that Owens-Illinois withdrew from the conspiracy in 1958 when it sold the Kaylo division to Owens Corning Fiberglass. the plaintiff was not exposed to Kaylo until 1972. Accordingly, the conspiracy had concluded long before and entry of summary judgment in favor of Owens-Illinois was affirmed.

Summary Judgment Affirmed in Railroad Case Upon Plaintiff's Failure to Preserve Issue for Appeal

(Superior Court of Pennsylvania, June 12, 2018)

The plaintiff, Michael Eorio filed suit against multiple defendants including CBS and General Electric (GE) alleging he contracted lung cancer while working as a railroad employee from 1972-2010. The plaintiff and one co-worker alleged Mr. Eorio had been exposed to asbestos containing products for which CBS and GE were liable. The plaintiff passed away prior to trial and a substitution of the plaintiff was entered. CBS and GE moved for summary judgment. The trial court granted summary judgment as to both defendants and the plaintiff appealed.

On appeal, the plaintiff took exception that the trial court found him not qualified to testify about his exposure to asbestos products. However, the court quickly noted that the plaintiff had not raised that issue in his appeal and therefore waived that issued. Secondly, the plaintiff argued the trial court "ignored evidence" as to his exposure. According to the plaintiff, a genuine issue as to material fact existed. The court noted the standard for summary judgment which permits summary judgment when 'ho genuine issue of material fact" exists. Further, the court relied on the standard for summary judgment in asbestos cases which requires the plaintiff to "show that he inhaled asbestos fibers shed by the specific manufacturer's product." Here, the court noted that the trial court concluded that the plaintiff's evidence was nothing more than speculation. That finding did not raise a genuine issue as to material fact. Accordingly, summary judgment was proper and therefore affirmed by the court.

Read the case decision here.

Mill Defendant's Summary Judgment Motions Granted in Community Exposure/Take-Home Case

(United States District Court, W.D. Wisconsin, June 8, 2018)

Weyerhauser operated a manufacturing facility in Marshfield, Wisconsin from 1960 to 2000. Among other wood products manufactured at the mill, Weyerhauser produced asbestos-core doors in Marshfield from 1971 to 1978. The plaintiffs' decedents Elvira Kilty and Herbert Spatz each worked at the Marshfield Weyerhauser mill. Due to the Wisconsin Workers' Compensation bar, they alleged that their mesothelioma was caused by community exposures and/or household exposures emanating from the clothing of their children and father, respectively, all of whom also worked for Weyerhauser. Weyerhauser moved for summary judgment, which the court granted.

In its analysis, the court noted that the plaintiffs' experts conceded that the plaintiffs' occupational exposures were substantially more than any non-occupational exposures, and would have been sufficient to have independently caused decedents' mesotheliomas. The plaintiffs' evidence did not provide a reasonable basis for their experts' opinions supporting the community exposure and take-home theories. The court concluded that there was insufficient evidence showing that the decedents' relatives were directly exposed to asbestos, much less that a take-home exposure occurred. Further, plaintiffs did not adequately establish that any community exposure occurred given the time period that they lived in proximity to the plant, and due to tenuous anecdotal evidence of alleged pollution from the mill.

Brake Lining Manufacturer's Summary Judgment Affirmed in Part in Second Filing in Different Counties

(Court of Appeals of Ohio, Ninth District, Summit County, June 6, 2018)

Plaintiff Margie Taylor, the executor of the estate of her father Russell Young, originally filed claims against Goodyear Tire & Rubber Company in the Cuyahoga County Court of Common Pleas, alleging that Young was exposed to asbestos from work on aircraft brake linings during his employment with Goodyear Aerospace Corporation. Goodyear filed a motion for summary judgment on premises liability, negligent undertaking, and intentional tort claims, which was granted by the court in an entry on the electronic "File & Serve" docket, and journalized with the Clerk of Courts with language indicating "there is no just reason for delay pursuant to Ohio Rule of Civil Procedure 54(B)." The plaintiff

moved to vacate the 54(B) language of the summary judgment order, which was granted on the File & Serve docket, but never journalized. The Cuyahoga County case was subsequently dismissed.

The plaintiff filed a second lawsuit in the Summit County Court of Common Pleas against several defendants, including Goodyear, and included claims for premises liability, negligent undertaking, intentional tort, and products liability. Goodyear moved for summary judgment, arguing that res judicata barred the three claims asserted against it in both the Cuyahoga and Summit County actions. The trial court granted the motion as to the premises liability, negligent undertaking, and intentional tort claims, and the plaintiff appealed the ruling. Although the plaintiff's motion to remove the 54(B) language from the order in Cuyahoga County was granted, it was not journalized. Citing Ohio authority that holds that courts only speak through journalized entries, the appellate court affirmed the application of res judicata and barred the claims.

Goodyear also moved for summary judgment on the products liability claims, arguing that Ohio products liability law required a showing that a product was defective when it left the control of a manufacturer, and that this could not be demonstrated by the plaintiff as Young allegedly worked on the aircraft brakes ***during*** the manufacturing process. The trial court granted Goodyear's motion and the plaintiff appealed. The appellate court reversed, finding a dispute of fact regarding the Goodyear entities controlling the manufacture of the aircraft brakes. They further stated that they could not hold as a matter of law that a product that is still in the manufacturing process is in the control of the manufacturer for purposes of products liability.

Read the full decision here.

3M's Motion for Summary Judgment Regarding Allegedly Defective Respirators Denied

(USDC for the Western District of Wisconsin, June 1, 2018)

In a consolidated case, two plaintiffs asserted strict liability and negligence claims against 3M regarding respirators they wore at a factory which manufactured fireproof doors containing asbestos cores. Both plaintiffs developed mesothelioma from alleged asbestos exposure.

The plaintiffs were employed by Weyerhauser for approximately 40 years each. In 1972, a company memo required all employees to wear respirators whenever mineral core was machined or sanded. Testimony provided that plaintiffs wore 3M masks. In that same year, 3M received the necessary certificate of approval from the National Institute of Occupational Safety and Health and the U.S. Bureau of Mines. 3M argued in its motion for summary judgment that, pursuant to Wisconsin law, this regulatory approval created a rebuttable presumption that the respirators were not defective. In response, plaintiffs produced extensive evidence that the respirators were defective because they failed to meet the required inhalation and exhalation pressure drop values.

The court denied 3M's motion for summary judgment because a reasonable jury could find that 1) pressure drop related to comfort but also impacted faceseal and, in turn, the ability of the mask to prevent asbestos exposure; and 2) 3M manufactured and sold masks that did not meet the certification requirement values for pressure drop. The court cautioned that its ruling did not mean that the plaintiffs' task of establishing liability would be easy, as they still had to demonstrate that: the two arguable deficiencies constituted defects; the defects caused exposure to asbestos; and the defects were a substantial contributing factor in causing their mesothelioma.

Read the full decision here.

Allegations of "Information and Belief" Interrogatory Answers Insufficient to Overcome Summary Judgment

(Supreme Court of the State of New York, Fifth Judicial District, May 23, 2018)

The decedent Julia Sgarlata's estate brought suit against various companies alleging that she was exposed to asbestos while employed as an inspector, and as a shipping and receiving manager at Diemolding Corporation in New York State from 1955 to 1990, causing her peritoneal mesothelioma. The court issued a written decision on its April 19, 2018 grant of summary judgment for defendant Cytec Engineering, f/k/a American Cyanamid as successor to Fiberite (Fiberite), finding no evidence that the decedent was ever in the presence of a Fiberite product.

In its analysis of the facts, the court noted that the plaintiff's interrogatory answers in the case were verified on "information and belief," and included a chart titled "Jobsite Specific Exposure History," which listed product manufacturers by name, and included Fiberite. The sole witness in the action was decedent's son, who admitted that

he had no knowledge of any of the products or materials used at Diemolding, or whether they contained asbestos. In opposition to Fiberite's motion, the plaintiff submitted deposition testimony from a Diemolding employee from an unrelated prior case that identified Fiberite products at Diemolding. There was no dispute that Fiberite had sold products to Diemolding during relevant time periods.

In finding summary judgment for Fiberite, the court noted guiding authority that held that "(t)he contentions of the plaintiff and his attorney, made only upon information and belief…do not suffice as proof in evidentiary form to create a question of fact requiring trial." Thus, although Fiberite was identified in the interrogatory responses, by another Diemolding employee, and by Fiberite itself, who conceded that its products were at the site, the court relied on the absence of any evidence showing that the decedent was in the presence of Fiberite's products in granting Fiberite's motion.

Read the full decision here.

Defects in Chain of Custody Lead to Affirmation of Talcum Powder Defendant's Motion for Summary Judgment

(Court of Appeal, Second District, Division 4, California, May 16, 2018)

The plaintiffs Barbara and John Wittman asserted claims for negligence, strict liability, breach of warranty, and loss of consortium against Defendant Coty, Inc. (Coty) alleging that Barbara's exposure to asbestos in Coty's talcum powder resulted in her developing mesothelioma.

Coty filed a motion for summary judgment, contending that Wittmans' discovery responses and deposition testimony "demonstrated their inability to prove the claims." Coty stated that the Wittmans could not show that Barbara was exposed to asbestos through the particular Coty product she had used, namely, a specific face powder. Coty further sought summary judgment on the request for punitive damages on the grounds that the Wittmans could not show oppression, fraud, or malice.

The Wittmans opposed summary judgment and summary adjudication, contending that Coty "did not carry its initial burden regarding their purported inability to show Barbara's exposure to asbestos from Coty's product and the existence of oppression, fraud, or malice." They further maintained that there were triable issues regarding the requisite asbestos exposure, relying on a declaration from expert John Harris, who stated that he found asbestos fibers in some face powder provided to him.

The trial court granted summary judgment, holding that Coty carried its initial burden regarding whether the Wittmans lacked needed evidence of Barbara's exposure to asbestos. The court further ruled that John Harris's declaration was inadmissible, largely based on the fact that the Wittmans did not establish a chain of custody for the face powder provided to Harris.

The appeals court held that plaintiffs' discovery responses were factually devoid with regard to Barbara's alleged exposure to asbestos from Coty's product; the responses contained only general allegations against Coty, rather than "specific facts showing that [Barbara] was actually exposed to asbestos-containing material from [Coty's] products. The court further ruled that the collective evidence showed only that Barbara found an opened container of Coty's product and supplied it to her husband for delivery to their counsel, who offered no evidence regarding "what, if anything was delivered, how it was stored, whether and how it was repackaged, how it was labelled, how it was sealed, and how it was delivered to…Harris." As such the appeals court affirmed Coty's motion for summary judgment.

Read the full decision here.

Wisconsin's Uniform Fraudulent Transfer Act Found Not Applicable in Successor Liability Case Against Refractory Manufacturer

(Supreme Court of Wisconsin, May 15, 2018)

In a follow up to Asbestos Case Tracker's previous post, the Supreme Court of Wisconsin reversed the Court of Appeals' decision in a recent mesothelioma case involving allegations of fraudulent conveyance by a successor in interest entity.

The plaintiff originally filed suit against several defendants including Fire Brick Engineering and Powers Holding claiming they were responsible for her late husband's development of mesothelioma. Mr. Springer was allegedly

exposed to asbestos from 1963-69. The plaintiff filed her suit against Powers naming it as successor to Fire Brick Engineers (FBN1). FBN1 manufactured asbestos containing products including refractory materials. Years after being formed, investors formed an entity that would purchase the "assets only" of FBN1. The entity that bought the assets only was known as FBN2 until it was acquired by a different company that ultimately became Powers. The plaintiff sought to hold Powers liable for the development of Mr. Springer's mesothelioma as a successor to FBN1 despite the fact that no entity assumed its liabilities.

The court determined that the exception to the Wisconsin's Uniform Fraudulent Transfer Act (Act) should not be applied to Mrs. Springer's case. The court was troubled by the Act's focus upon the asset transferred rather than the intent of the transfer. The Act was also limited in its scope because of a short statute of limitations. Moreover, the Act does not take into account the "legislative policies embodied in our business related statutes." Common law theories of fraudulent conveyance reasonably guides the court in the exception to non-liability of successors in interest. The application includes a look at the consideration paid for the assets and whether the consideration is adequate. However, the amount of the consideration paid is not necessarily controlling in determining whether the intent to convey was based in fraud.

As for the trial court's dismissal of the defendant, the court noted the plaintiff sought to hold them liable under a theory of successor liability. However, the course taken by the plaintiff in the trial court was sounded in negligence and strict liability. According to the court, the defendant put the plaintiff on notice in its answer that she had sued the wrong company. The plaintiff did nothing throughout the litigation to amend the pleadings to address the fact that the defendant in question was formed ***after*** the plaintiff's last exposure. Consequently, the grant of summary judgment was proper.

The court interpreted a lone dissent to argue that the court's decision was ***sua sponte*** and should not have analyzed whether the plaintiff "adequately pled a claim of successor liability."

Read the full decision here.

Employer and its Insurer Granted Summary Judgment Due to Longshore and Harbor Workers' Compensation Act Exclusivity

(U.S. District Court for the Eastern District of Louisiana, April 30, 2018)

The plaintiff sued his employer and its insurance company alleging that he developed lung cancer as a result of exposure to asbestos while working as a pipefitter for Huntington Ingalls at the Avondale Shipyard. Defendants moved for summary judgment arguing that plaintiff's claims against them are subject to the exclusivity of the Longshore and Harbor Workers' Compensation Act (LHWCA). The plaintiff did not substantively oppose this motion, and affirmatively indicated his intention to pursue LHWCA claims against these defendants. The plaintiff filed his own motion to voluntarily dismiss the defendants without prejudice. The court granted summary judgment for the defendants and ruled the plaintiff's motion to dismiss was moot. "Dismissal without prejudice is not justified when a request for voluntary dismissal is 'intended to avoid an imminent adverse result on summary judgment.'"

In its analysis, the court notes that there is a lack of dispute that the defendants are covered by the LHWCA. It stated that the plaintiff satisfied both the "status" and "situs" elements of qualification under the act, as he was employed by the defendant, and his injuries occurred on a vessel covered by the act. The court acknowledged that the LHWCA provided the exclusive remedy for these types of injuries, and further noted that the provisions of the act also covered claims against the defendant's insurers and executive officers.

Read the full decision here.

Summary Judgment Affirmed For Railroad After Plaintiff Settles and Files Subsequent Suit for Lung Cancer

(Court of Common Pleas of Philadelphia County, April 24, 2018)

The plaintiff filed a claim for Federal Employer's Liability Act (FELA) against Conrail for the development of alleged asbestosis in 1997. The parties settled in 2004 and executed an agreement that contemplated a release for "all known and unknown…injuries for any and all forms of cancer…" Years later, the plaintiff developed lung cancer and filed suit alleging the injury was a result of exposure to asbestos for which Conrail was liable. Conrail moved for summary judgment arguing that the claim was barred by the prior settlement. The court granted Conrail's motion for summary judgment and the plaintiff appealed.

The plaintiff took the position that the release was invalid under FELA as the scope of the settlement did not contemplate claims for malignancy. In short, the plaintiff argued that the court should have applied the standard in ***Babbitt*** where the test calls for a release only on known claims for specific injuries. However, Conrail countered and pointed out that the court already had followed the standard in ***Wicker*** which found that a FELA release is valid provided the "scope of the release is limited to those risks which are known" at the time of execution. The court agreed with Conrail. The ***Wicker*** standard is "highly fact intensive" and from this matter it was clear that Plaintiff did not to rebut Conrail's position that the language of the release included claims for malignancy. Moreover, nothing was put forth by the plaintiff that he did not understand the risks of cancer from the alleged exposure when he signed the agreement.

Accordingly, summary judgment was affirmed in favor of the defendant.

Read the full decision here.

Claims Against Insulation Supplier Barred By Government Contractor Defense

(Court of Appeal of California, First District, Division 4, April 19,2018)

Plaintiffs Paula Tarjani, Phyllis Newman, and Patsy Rojo, daughters of the plaintiff's decedent John Ball, brought claims against numerous defendants, alleging that the plaintiff's decedent was exposed to asbestos while working as a joiner and shipwright from 1965 to 1972. The plaintiff's decedent worked at Mare Island aboard the USS Guitarro, USS Hawkbill, USS Pintado, and USS Drum.

Defendant Metalclad brokered Unibestos to the United States Navy, and filed a Motion for Summary Judgment, stating that the plaintiffs' claims were 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 argued that it 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.

The trial court ruled that :"Defendant has shown by admissible evidence and reasonable inference therefrom that Metalclad is not liable as a government contractor. The United States government approved precise specifications for the Metalclad-supplied Unibestos; the Metal-clad supplied Unibestos conformed to the government's specifications; and Metalclad had no duty to warn the government because the government was well aware of the potential hazards of asbestos." The trial court further stated that Pittsburgh Corning, the manufacturer of Unibestos supplied by Metalclad, provided warnings.

The Appeals Court upheld the trial court's ruling, and additionally held that "there simply is no evidence as to whether Metalclad could have directed Pittsburgh Corning to place an asbestos warning on the boxes of Unibestos, or whether Pittsburgh Corning could have, or would have, complied with such a request. On this record, these are matters of speculation, which does not, and cannot, raise a triable issue."

Read the full decision here.

Summary Judgment Granted and Request for Continuance Denied Based Upon Lack of Evidence

(U.S. District Court for the Northern District of California, April 16, 2018)

Defendant, Rohr, Inc., filed a motion for summary judgment based upon a lack of evidence demonstrating the plaintiff was exposed to a Rohr product. The plaintiffs opposed the motion, but failed to present any such evidence in support of their opposition. The plaintiffs also filed a motion to continue, pursuant to Federal Rule of Civil Procedure 56(d), for additional time to conduct discovery. To succeed on such a motion, the moving party must show: 1) an affidavit setting forth the specific facts to be elicited from further discovery; 2) the facts sought exist; and 3) the sought-after facts are essential to oppose summary judgment.

For the second requirement, the plaintiffs argued that 'if Rohr were to actually search their records … they would uncover the components used to make and assemble the products at issue." The court found this argument to be mere speculation, particularly since Rohr's records were the subject of numerous discovery disputes. The court had recently denied the plaintiffs' motion for sanctions, concluding that Rohr took steps that reasonably complied with a January

2018 discovery order. Therefore, the plaintiffs failed to meet their burden of demonstrating that a Rule 56(d) continuance should be granted, and failed to present any evidence of Rohr's liability. Summary judgment was accordingly entered.

Read the full decision here.

Other Summary Judgement Decisions

- Bare Metal/ Component Parts Decisions
  - **Boiler Manufacturer's Summary Judgment Reversed; Question of Fact on Product ID *and Denial of Bare Metal Defense***
    (U.S. District Court for the Northern District of California, April 2, 2018)
- Expert Challenges Decisions
  - **Insufficient Evidence to Show Chrysotile Flooring Products Caused Plaintiff's Peritoneal Mesothelioma**
    (Supreme Court, State of New York, Nassau County, April 18, 2018)
- Federal Officer Jurisdiction Decisions
  - **Valve Manufacturer's Renewed Motion for Summary Judgment Granted Based on Preclusion of Plaintiff's Expert Witness**
    (U.S. District Court for the District of South Carolina, March 29, 2018)
- Maritime/ Admiralty Law Decisions
  - **Court Grants Summary Judgment to Some Pump Manufacturers, While Denying it to Others in Maritime Action**
    (U.S.District Court, Eastern District of Pennsylvania, May 22, 2018)
  - **Federal Court Denies Summary Judgment Under Massachusetts Statute of Repose, But Grants Defendants' Motions on Other Grounds**
    (U.S. District Court for the District of Massachusetts, March 30, 2018)

Verdict Reduction Decisions

NYCAL Judge Rejects Causation Challenge; Reduces $75 Million Verdict to $17,250,000

(Supreme Court of the State of New York, New York County, October 11, 2018)

Late Thursday night, NYCAL Justice Joan Madden issued a long awaited post-trial motion decision in ***Robaey v. Air and Liquid Systems, et al***, NYCAL Index No. 190276/13, previously reported by ACT here. In January of 2017, a New York City jury returned a record setting $75 Million verdict, comprising $50 Million for plaintiff, Ms. Marlena F. Robaey ($40 Million in Past Pain and Suffering and $10 Million in Future Pain and Suffering), and $25 Million for derivative plaintiff, Mr. Edward Robaey ($15 Million for Past Loss of Consortium and $10 Million for Future Loss of Consortium). The verdict was found against two automotive gasket manufacturers, Dana and FelPro, who were both found reckless.

The Robaeys filed suit against numerous defendants in relation to Ms. Robaey's peritoneal mesothelioma, which was allegedly caused by take-home exposures from her husband's maintenance work at a local hospital and non-occupational automotive repairs performed in the plaintiffs' home. In a post-trial motion both Dana and Felpro challenged the sufficiency of the plaintiffs' causation evidence seeking judgement as a matter of law, and in the alternative for either a new trial or a substantial reduction of the $75 Million verdict. Dana settled with the plaintiffs during the pendency of the motion.

In her decision, Justice Madden granted the post-trial motion solely to the extent of reducing the jury award to $17,250,000, comprising $16 Million for Ms. Robaey ($12 Million in Past Pain and Suffering and $4 Million in Future Pain and Suffering), and $1,250,000 for Mr. Robaey ($1 Million for Past Loss of Consortium and $250,000 Million for Future Loss of Consortium.) Thursday's remitted award is nearly $8 Million dollars higher than the largest New York appellate sustained asbestos award to date, $9.5 Million. Notably, the remitted value also relates to the longest asbestos pain and suffering period remitted to date, (52 months of Past Pain and Suffering, and 12 months Future Pain and Suffering) The remitted awards therefore correspond to: $230K per month in Past Pain and Suffering, $333K per month in Future Pain and Suffering, $19.2K per month in Past Loss of Consortium, and $20.8K per month in Future Loss of Consortium.

With respect to causation, Justice Madden denied FelPro's challenge in its entirety. FelPro's causation challenge was premised primarily on the First Department decision in ***Juni***. (A primer on the ***Juni*** decision published by ACT in advance of the New York Court of Appeals oral argument to be held on October 16, 2018 can be found here.) In distinguishing ***Juni***, Justice Madden observed that while the ***Juni*** "decision indicates the claims at trial involved asbestos exposure from work on defendant's brakes, clutches and manifold gaskets, the decision addresses the quantification issues only with respect to brakes." She therefore reasoned that the ***Juni*** decision did not assail the legal sufficiency of visible dust testimony with respect to the automotive gaskets at issue. Justice Madden additionally found that despite the ***Juni*** decision's holding that the cumulative theory of exposure "is irreconcilable with the rule requiring at least some quantification or means of assessing the amount, duration, and frequency of exposure to determine whether the exposure was sufficient to be found a contributing cause of the disease," Dr. Markowitz's testimony that "the total cumulative exposure from all those opportunities for exposure and that dust from asbestos containing gaskets all contribute to the total dose that caused the disease" was credible to establish causation, so long as those exposures could be subjectively characterized as having "occurred repeatedly over a long period of time."

The court further rejected Felpro's post-trial challenge with respect to the jury's finding of recklessness and various evidentiary rulings.

Read the full decision here.

Court Hears Motions to Overturn Verdict in $117 Million New Jersey Talc Case

(Middlesex County, New Jersey)

In April of this year, a New Jersey jury awarded $37 million in compensatory damages and $80 million in punitive damages to plaintiff Stephen Lanzo, who alleged that he developed mesothelioma from years of use of defendants' talcum powder, which the plaintiff claimed was contaminated with asbestos. On Wednesday, May 23, 2018, the court heard arguments on Imerys Talc America, Inc.'s motions to overturn the verdict. In asking the court to overturn the verdict, Imerys argued the plaintiff had presented no competent evidence at trial regarding the frequency of the plaintiff's alleged exposure to talc, which forced the jury to speculate regarding potential exposure. They further argued that the court was incorrect in instructing the jury to apply an adverse inference to Imerys regarding the company's alleged failure to retain talc samples going back to 1979, given that they were disposed of as a matter of course pursuant to routine, historical policies.

Imerys next argued that the value of the compensatory verdict "shocked the conscience," and demonstrated that the jury was confused about what damages were recoverable, following Lanzo's counsel's alleged encouragement to compensate Plaintiff for his future death in closing arguments. Finally, Imerys argued that the court should have instructed the jury on the sophisticated intermediary doctrine, which would hold that Imerys had no duty to warn given the distribution of their product through a sophisticated third party. The court did not rule on the motions, and will hold more hearings on defendants' post-trial motions in the upcoming weeks.

Case Remanded to Determine Setoff Amounts from Settlements with Asbestos Trusts

(Supreme Court of Mississippi, February 15, 2018)

On February 13, 2009, Clara Hagan filed a complaint, as the representative of Bennie Oakes, against Illinois Central Railroad in the Warren County Circuit Court. The complaint, brought under the provisions of the Federal Employers Liability Act, sought to recover damages for personal injuries and/or death sustained by decedent Bennie Oakes while decedent was employed by Illinois Central and while engaging in interstate commerce. The decedent was employed by Illinois Central from 1952 through 1994 and alleged he was exposed to asbestos "on a daily basis."

The first trial occurred in 2011 but resulted in a hung jury. The jury in the second trial found in favor of Hagan and awarded $250,000; however, the jury also apportioned fault, with Illinois Central being twenty percent at fault and Oakes being 80 percent. Therefore, the circuit court adjusted the damages accordingly, and the total award was $50,000. Illinois Central filed a Motion of Entry of Judgment and Setoff to have the damages reduced further based on the fact that Hagan had received more than $65,000 in payments from asbestos trusts for Oakes's injuries and death. The circuit court denied the motion and entered judgment of $50,000 plus eight percent interest.

Illinois Central appealed, and the Court of Appeals framed the issue on appeal as "whether setoff against a jury verdict is required in Federal Employers' Liability Act cases where the claimant has already settled with separate tortfeasors." The Appeals Court held that "an allowance of setoff for recoveries from nonparty tortfeasors is inconsistent with the Act's intent, the statutory language, and Mississippi and U.S. Supreme Court precedent."

Illinois Central petitioned the Supreme Court of Missouri, arguing that the Court of Appeals decision was in "irreconcilable conflict with previous opinions…and disregards the controlling federal law on the issue." Illinois Central further argued that the Court of Appeals' decision erred in holding that the collateral source rule applied to asbestos trusts set up by the now-bankrupt manufacturers as a condition of their bankruptcy proceedings. Finally, Illinois Central contended that the Court of Appeals' decision effectively "obliterates" the one-recovery rule by allowing Hagan to collect from the asbestos trust for the asbestos-related injury and also from Illinois Central for the same asbestos-related injury.

The Supreme Court agreed with Illinois Central's reasoning, and held that Illinois Central was entitled to a setoff of the jury verdict based on Oakes's or Hagan's receipt of settlement funds from an asbestos bankruptcy trust if the funds compensated for the same injuries alleged in the instant lawsuit.

The Supreme Court further held that the record was "less than clear" that the settlements were to compensate for the same injuries as alleged in the instant lawsuit and remanded the case back to the Court of Appeals and circuit court for a hearing, if necessary, to determine whether the settlement indeed compensated the plaintiffs for the same injuries and the same type of damages as alleged in the lawsuit.

Read the full decision here.