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Asbestos Case Tracker

2016 Mid-Year Compendium

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Asbestos Case Tracker

Compendium

January 2016 to June 2016

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Bankruptcy Decisions

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

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

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

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

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

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

Read the full decision here.

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

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

The plaintiff, Salvador J. Parra, Jr., developed asbestosis after working as an insulator and sued Marsh USA, Inc., an insurance broker, and others. Marsh filed a motion in the bankruptcy cases of Johns-Manville, arguing it was relieved of liability for the plaintiff's claims. The bankruptcy court granted the motion, and the plaintiff appealed. The district court affirmed in part, reversed in part, and remanded the case to the bankruptcy court for further proceedings. Marsh was Manville's primary insurance broker from 1944-1982. Manville had sued Marsh, alleging it failed to procure sufficient insurance coverage. In 1986, Marsh settled with Manville, and the bankruptcy court approved Manville's plan of reorganization. The insurance settlement order included a settlement fund, with a payment by

Marsh that released all Marsh claims, even if they were not known, and an injunction against future Marsh claims. In this case, Marsh argued that Plaintiff's claims fell within this settlement order. The plaintiff filed a response, arguing various points.

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

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

Read the full decision here.

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

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

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

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

Read the full decision here.

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

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

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

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

the bankruptcy trustees were the proper plaintiffs, the court allowed for time for the proper plaintiffs to be substituted in these actions.

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

Bare Metal/Component Parts Decisions

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

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

The decedent died of mesothelioma; prior to his passing he filed a lawsuit in state court alleging exposure to asbestos while a production shift supervisor during his employment at a paper mill in Georgia. One defendant removed, and the action was transferred to MDL 875. Defendant Crane Co. filed for summary judgment, which was granted in part by the MDL court; however, it remanded to the Northern District of Georgia to determine whether the bare metal defense was available under Georgia law. Crane then moved for summary judgment on the basis of this defense, which was granted. The plaintiff appealed and the Eleventh Circuit affirmed.
Co-worker testimony established that some of the industrial valves at the mill were made by Crane, but no specific types of Crane valves were identified. All the valves required the removal and replacement of gaskets and packing. Testimony established the decedent's close proximity while gaskets were replaced, but not packing. No employee testified that the replacement gaskets and packing were made by Crane, but instead were supplied by third-party vendors. There was no evidence that the worn gaskets and packing were original to Crane valves.
Under Georgia law, an asbestos plaintiff must present evidence of exposure to asbestos-containing products for which the defendant was responsible. Here, a reasonable jury could conclude that the decedent was exposed to asbestos-containing dust from gaskets being replaced and used with Crane valves. However, there was no evidence that these replacement parts were supplied by Crane. Thus, the plaintiffs failed to show that decedent's injuries were caused by asbestos parts supplied by Crane.

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

Read the full decision here.

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

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

In January 2013, this case was removed on the basis of federal question jurisdiction and assigned to MDL 875. The plaintiffs alleged asbestos exposure while serving in the Navy. Applying maritime law, the court granted summary judgments filed by Buffalo Pumps, CBS Corporation, Foster Wheeler, General Electric, IMO Industries, and Warren Pumps, based upon the bare metal defense. The plaintiffs appealed and the Third Circuit remanded the case to the MDL court to clarify whether it: (1) considered the negligence theory of liability; (2) concluded that the bare metal defense applied to negligence claims; (3) considered whether this case warranted application of the legal rationale by which other courts exempted negligence claims from being barred by the defense. The MDL court clarified as follows.

The court offered a brief history of the application of the bare metal defense, noting that the MDL adopted this defense as applied by the Sixth Circuit in two separate maritime cases. In deciding to adopt these decisions, the MDL also noted that most of the asbestos cases pending in the MDL originated in the Sixth Circuit. While an MDL court applies the law of the Circuit in which it sits to matters of substantive federal law, at the time of this case the bare metal defense had never been squarely addressed by the Third Circuit, where this case originated. However, although this case was not part of the maritime docket, the application of federal maritime law must be consistent.

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

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

Read the full decision here.

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

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

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

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

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

Read the full decision here.

Consolidation Decisions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The New York Court of Appeals declined to accept Crane's proposed rule. The court specifically noted that the determination of whether a duty exists turns to a substantial degree on a reasonable and fair allocation of costs and

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

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

Read the full decision here.

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

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

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

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

TLC failed to preserve this challenge for appellate review. TLC did not specifically challenge the joint trial until its post-trial motion, which was insufficient to preserve its contention for appellate review. Although TLC argued it was unnecessary to renew its objection after the five other cases settled because it joined all defendants in opposing the plaintiffs' pretrial motion, the court disagreed. If, after the five cases settled, TLC believed the Supreme Court should consider the propriety of a joint trial anew, it was incumbent upon TLC to object and raise specific arguments it did not assert until the post-trial motion. TLC did not do so.

Read the full decision here.

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

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

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

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

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

Read the full decision here.

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

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

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

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

As the court held: "One flaw in defendants' argument is their position that consolidation is only meant for litigants 'in nearly identical matters.' Pursuant to CPLR section 602 (a), '[w]hen actions involving a common question of law or fact are pending before a court, the court, upon motion, may order a joint trial of any or all the matters in issue, may order the actions consolidated, and may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.' Trial courts have the authority to consolidate asbestos cases pursuant to CPLR 602 (a) where they involve common questions of law and fact (Matter of New York City Asbestos Litig. (Dummitt) 121 AD3d 230 [1st Dept 2014]). Moreover, 'there is a preference for consolidation in the interest of judicial economy and ease of decision-making where there are common questions of law and fact, unless the party opposing the motion demonstrates that consolidation will prejudice a substantial right' (Matter of Progressive Ins. Co. (Vasquez-Countrywide Ins. Co.), 10 AD3d 518 [1st Dept 2004]). While defendants assert that their substantial rights are prejudiced by joinder in asbestos cases, they have not demonstrated that such prejudice will occur in the proposed two-plaintiff trials proposed herein."

Read the full decision here.

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

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

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

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

Read the full decision here.

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

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

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

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

Read the full decision here.

Damages Decisions

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

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

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

appellate court, in an extensive summary of the first and second trials, and with extensive analysis of each point of appeal, affirmed all the trial court's rulings.

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

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

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

Read the full decision here.

Discovery Decisions

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

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

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

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

Regarding relevance, Maune argued these documents were relevant because Ford routinely used Exponent's friction studies to argue that the "independent" studies indicated that friction products could not cause asbestos-related disease. Maune argued these studies were not "independent" and the documents at issue evidenced backroom

discussions and a financial and business relationship between Ford, Chrysler, General Motors, and Exponent. Exponent argued the documents were not relevant to establish the bias of testifying experts, and their experts relied on the studies, not the documents at issue. The court found that the court did not abuse its discretion in concluding the documents were relevant and discoverable. The documents related to the studies and scientific defense that Ford used at trial.

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

Read the full decision here.

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

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

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

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

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

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

Expert Challenges Decisions

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

(Georgia Supreme Court, July 5, 2016)

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

This case first commenced when the plaintiff and his wife, Roy and Milva Knight, sued Scapa Dryer Fabrics, Inc., alleging that Roy's mesothelioma was caused from exposure to asbestos while he was working as an independent

sheet metal contractor at Scapa's facility. During the trial, the jury heard other evidence of 29 additional non-party entities associated with products that may have also exposed Roy to asbestos. The jury found against Scapa and Union Carbide, and apportioned liability as follows: 40 percent Scapa; 40 percent Union Carbide; and 20 percent Georgia Pacific. Based on the apportionment, the trial court entered judgment against Scapa in the amount of $4,187,068.95. However, Scapa subsequently appealed on multiple evidentiary rulings, most notably the admissibility of Dr. Abraham's testimony (Union Carbide settled after the verdict was not part of the appeal).

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

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

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

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

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

Read the full decision here.

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

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

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

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

In its motion to exclude, Trinity argued the trial judge should strike Dr. Liuzza's opinion on medical causation because the methodology used in reaching his opinion was flawed in two respects. First, Trinity pointed out that, while he acknowledged that cigarette smoking is the leading cause of lung cancer, Dr. Liuzza nevertheless did not know about, and thus did not consider, Mr. Boudreaux's thirty-year history of smoking three packs of cigarettes a day. Second, Trinity noted that Dr. Liuzza formed his causation opinion without any underlying evidence regarding the dosage of asbestos received by Mr. Boudreaux via occupational exposure. Trinity claim, in a normal case, a plaintiff's pathologist is not qualified to calculate asbestos dosage and so will rely upon the opinion of the plaintiff's industrial hygienist when forming his opinion on causation. In this case, Trinity notes, Dr. Liuzza formed his opinion without the benefit of an industrial hygienist's dosage report, but relied instead upon twenty-five pages excerpted from the 108-page deposition of Terry Thibodeaux, one of Mr. Boudreaux's co-workers. Based on these excerpts, Dr. Liuzza assumed that Mr. Boudreaux was exposed to asbestos on a near-daily basis. When asked at deposition, however, about various work-related factors that could impact the extent of Mr. Boudreaux's historical exposure, factors discussed by the co-worker in the 83 pages of deposition not provided to him, Dr. Liuzza conceded that he would have to defer to an industrial hygienist.

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

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

Read the full decision here.

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

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

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

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

Henkel and Dexter Motion to Exclude Longo's Opinions and Experimental Tests under Daubert

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

Dr. Longo opined that Mr. Dugas "would have been exposed to significant levels of airborne asbestos fibers" while Mr. Dugas was "sanding" and "filing" asbestos-containing adhesives such as EPON 934. Following his initial report, Dr. Longo created several work-practice experiments which involved Dr. Longo's attempts to recreate EPON 934 and to test his version of EPON 934 under work practices similar to those employed by Mr. Dugas. With respect to these experiments, Dr. Longo was provided with the "manufacturing instructions" for EPON part A and part B which set out the formula and procedures for their mixture. The defendants argued that Dr. Longo's opinion and results should be excluded because he failed to apply a reliable methodology, and he failed to rely on sufficient facts and data. The defendants focus on Dr. Longo's deviations from: (1) the EPON 934 formula card; (2) the manner in which Mr. Dugas used EPON 934; and (3) the environmental conditions under which Mr. Dugas used EPON 934.

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

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

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

The court clarified that, in admitting that Dr. Longo's opinions from his work-studies, "demonstrative exhibits tend to leave a particularly potent image in the jurors' minds." Citation Omitted. In turn, this leads to the potential that Dr. Longo's video demonstration may unfairly prejudice defendants. For that reason, the court limited the plaintiff to presenting Dr. Longo's work-studies as illustrative of physical principles and not as reenactment evidence replicating

the actual levels of asbestos Mr. Dugas encountered. Thus, all demonstrative evidence, including videos of the work-studies, was excluded for being unfairly prejudicial.

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

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

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

UCT's Motion to Exclude "Clamp Study"

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

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

In response, Dr. Longo concede the clamp study did not replicate Mr. Dugas's working environment, but the study would demonstrate whether the clamps would release measurable amounts of respirable asbestos fibers. Dr. Longo did not dispute UTC's argument regarding the manner in which the clamps were tested but argued that issue should be addressed on cross-examination. Dr. Longo clarified defendants OSHA argument by explaining that his deviation actually improved the accuracy of the detection limits in the air sampling in that it caused asbestos to be detected where strict adherence to protocol previously produced no detection of asbestos.

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

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

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

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

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

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

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

Read the full decision here.

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

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

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

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

Westinghouse filed a motion *in limine* to exclude Dr. Vance and argued his opinion as to Micarta "is grounded in neither sufficient facts nor data, is not the product of reliable principles and methods, and contains that would assist the trier of fact." Upon reviewing the only available support for Dr. Vance's opinion, plaintiff's deposition testimony, the court found the plaintiff's testimony as inconclusive, at best, on the alleged asbestos content of Micarta. Consequently, the court concluded Dr. Vance's opinion rests only upon an unwarranted assumption rather than "sufficient facts or data," as required by the Federal Rules of Evidence, Rule 702(b) and Dr. Vance's opinion that the plaintiff was exposed to asbestos by working with Micarta was excluded from the case.

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

Read the full decision here.

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

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

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

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

able to challenge Dr. Bedrossian's testimony through cross-examination and was able to present the testimony of its own expert witnesses.

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

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

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

Read the full decision here.

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

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

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

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

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

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

Read the full decision here.

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

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

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

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

mesothelioma and there is evidence of any asbestos exposure from a product (regardless of fiber or dose), then the disease was caused by asbestos from the identified products; and that (3) the plaintiff's mesothelioma was caused by exposure to brake dust.

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

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

Read the full decision here.

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

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

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

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

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

Read the full decision here.

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

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

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

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

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

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

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

Read the full decision here.

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

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

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

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

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

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

Read the full decision here.

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

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

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

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

Read the full decision here.

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

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

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

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

Read the full decision here.

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

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

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

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

Read the full decision here.

Federal Officer Jurisdiction Decisions

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

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

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

The U.S. District Court for the Southern District of Florida granted the plaintiffs' motion to remand. In support of its doing so, the District Court noted that the plaintiffs had expressly disclaimed any attempt to recover for asbestos exposure based upon his four-year service on the U.S.S. Gato and cited that the supporting evidence, such as the complaint and exposure sheets, did not even reference Batchelor's time in the Navy, nonetheless any asbestos exposure during same. The District Court thus found that CBS could not raise a colorable federal defense based upon government contractor immunity to the plaintiffs' claims since its "sole basis for remove is its contention that

Plaintiff was exposed to asbestos while aboard the U.S.S. Gato, which is not at issue in this case[]" and thus, that the basis for removal pertained "to claims that simply do not exist." Accordingly, the case was remanded to the 11th Judicial Circuit in and for Miami-Dade County, Florida pursuant to 28 U.S.C. § 1447(c) due to lack of subject matter jurisdiction.

Read the full decision here.

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

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

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

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

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

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

Read the full decision here.

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

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

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

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

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

Read the full decision here.

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

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

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

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

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

Read the full decision here.

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

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

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

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

On appeal, from the U.S. District Court, the U.S. Court of Appeals for the Fifth Circuit analyzed federal removal on a three prong test. The court quickly dispensed of the first requirement and found the shipyard as a "person" within the

meaning of the removal statute. The vourt noted the U.S. Supreme Court's prior recognition of corporate entities as being a "person" for purposes of the statute. The second prong of the test dealt with a factual analysis of whether the federal government was indeed directing the defendant's conduct which resulted in the plaintiff's specific injuries. The District Court concluded that no causal connection existed between the two elements of the first prong, and, therefore, did not consider the third prong, whether or not the defendant had a colorable federal defense. The Appellate Court agreed with the District Court's finding that the requirement to use asbestos insulation did not exonerate the shipyard from liability for purposes of the plaintiffs' negligence claims. Relying on *Bartel v. Alcoa S.S. Co.*, 805 F.3d 169 (5th Cir. 2015), the court found that even where the federal government had required the use of asbestos insulation, it had not prevented the shipyard from warning Plaintiff about the dangers of asbestos. The court, again relying on *Bartel*, stated that "the Navy neither imposed any special safety requirements on the shipyard nor prevented the shipyard from imposing its own safety procedures." At the heart of the plaintiffs' case was the claim that the defendant's alleged conduct was not within the direction or control of the federal government.

Read the full decision here.

FELA Decisions

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

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

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

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

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

Read the full decision here.

Maritime/Admiralty Law Decisions

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

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

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

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

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

Read the full decision here.

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

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

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

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

Second, Foster Wheeler argued it was entitled to summary judgment due to the bare metal defense, where defendants can only be held liable for component parts that it manufactured or distributed. Crane also argued it was

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

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

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

Read the full decision here**.**

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

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

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

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

Read the full decision here.

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

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

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

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

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

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

Read the full decision here.

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

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

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

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

In its decision, the court went on to explain: "Like the Wicker release, the South release refers to a release of future claims arising out of asbestos exposure, and like Wicker release the South release contemplates a second injury. However, unlike the Wicker release, the South release does not even mention cancer, and neither release mentions mesothelioma. Further, although the language of the release is strong evidence of the parties' intent, it is not conclusive. Texaco has offered no proof (other than the language of the release) to demonstrate that Mason South intended to release a future claim for mesothelioma." The court went on to conclude "while Texaco may have

intended that the release bar this action, a release may not be "merely an engine by which an employer can evade FELA liability" (Wicker, 142 F3d at 700, supra)."

Read the full decision here.

Motions in Limine Decisions

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

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

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

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

Henkel and Dexter Motion to Exclude Longo's Opinions and Experimental Tests under Daubert

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

Dr. Longo opined that Mr. Dugas "would have been exposed to significant levels of airborne asbestos fibers" while Mr. Dugas was "sanding" and "filing" asbestos-containing adhesives such as EPON 934. Following his initial report, Dr. Longo created several work-practice experiments which involved Dr. Longo's attempts to recreate EPON 934 and to test his version of EPON 934 under work practices similar to those employed by Mr. Dugas. With respect to these experiments, Dr. Longo was provided with the "manufacturing instructions" for EPON part A and part B which set out the formula and procedures for their mixture. The defendants argued that Dr. Longo's opinion and results should be excluded because he failed to apply a reliable methodology, and he failed to rely on sufficient facts and data. The defendants focus on Dr. Longo's deviations from: (1) the EPON 934 formula card; (2) the manner in which Mr. Dugas used EPON 934; and (3) the environmental conditions under which Mr. Dugas used EPON 934.

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

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

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

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

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

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

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

UCT's Motion to Exclude "Clamp Study"

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

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

In response, Dr. Longo concede the clamp study did not replicate Mr. Dugas's working environment, but the study would demonstrate whether the clamps would release measurable amounts of respirable asbestos fibers. Dr. Longo did not dispute UTC's argument regarding the manner in which the clamps were tested but argued that issue should be addressed on cross-examination. Dr. Longo clarified defendants OSHA argument by explaining that his deviation actually improved the accuracy of the detection limits in the air sampling in that it caused asbestos to be detected where strict adherence to protocol previously produced no detection of asbestos.

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

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

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

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

Finally, UCT challenged Dr. Longo's method of analysis of a surface sample of dust taken from the engine bay of an abandonded airframe. Dr. Longo used the American Society for Testing and Materials D5755 to analyze the surface

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

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

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

Read the full decision here.

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

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

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

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

Westinghouse filed a motion *in limine* to exclude Dr. Vance and argued his opinion as to Micarta "is grounded in neither sufficient facts nor data, is not the product of reliable principles and methods, and contains that would assist the trier of fact." Upon reviewing the only available support for Dr. Vance's opinion, plaintiff's deposition testimony, the court found the plaintiff's testimony as inconclusive, at best, on the alleged asbestos content of Micarta. Consequently, the court concluded Dr. Vance's opinion rests only upon an unwarranted assumption rather than "sufficient facts or data," as required by the Federal Rules of Evidence, Rule 702(b) and Dr. Vance's opinion that the plaintiff was exposed to asbestos by working with Micarta was excluded from the case.

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

Read the full decision here.

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

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

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

The plaintiff designated Dr. Robert Vance, an industrial hygienist, to testify regarding the sources of the plaintiff's asbestos exposure. As to GE, Dr. Vance noted in his report that the plaintiff claimed to have worked with GE generators and asbestos-braided wiring at various job sites. Dr. Vance did not offer an opinion in his report regarding the plaintiff's alleged exposure to GE marine turbines. On cross-examination at his deposition, Dr. Vance clarified that

was only offering an expert opinion in the case in connection with GE wiring. However, upon later questioning by the plaintiff's counsel, Dr. Vance claimed that the plaintiff also would have been at risk of exposure by working in proximity to GE marine turbines.

GE moved *in limine* to exclude Dr. Vance's testimony regarding the plaintiff's exposure to asbestos from GE marine turbines on the basis that Dr. Vance's opinions were untimely and improperly disclosed pursuant to Rule 26 of the Federal Rules of Civil Procedure, which requires a complete disclosure all expert opinions pursuant to the scheduling order. The court found that Dr. Vance's opinion regarding GE marine turbines was untimely and was neither substantially justified nor harmless — such that exclusion of the opinion was an appropriate remedy pursuant to Federal Rule 37.

Additionally, GE argued that Dr. Vance's testimony was inadmissible per Federal Rule of Evidence 702 because it lacked a sufficient factual basis. In opining that the plaintiff was exposed to asbestos from GE wire, Dr. Vance had specifically relied upon testimony by the plaintiff that the plaintiff believed GE wire contained asbestos. Dr. Vance had no knowledge regarding the asbestos content of GE wire or the type of asbestos, if any, that was in the GE wire. Dr. Vance had not seen or reviewed any documentation indicating that GE wire actually contained asbestos during the relevant time period. The court agreed that Dr. Vance's opinion was, indeed, based on insufficient facts or data and was therefore inadmissible.

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

Read the full decision here.

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

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

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

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

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

studies? There are numerous questions the court could ask the experts regarding the reliability of these studies. The court must consider biases when interpreting an epidemiological study."

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

Read the full decision here.

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

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

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

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

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

Read the full decision here.

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

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

The plaintiff alleged the decedent was exposed to asbestos while serving in the Navy from 1947-52, and while on board the *USS Charles H. Roan*. Defendants Foster Wheeler and General Electric removed to federal court pursuant to the federal officer statute. Foster Wheeler moved for summary judgment based on: (1) the government contractor defense; (2) bare metal defense; and (3) its products were not a substantial factor in causing injury. Crane Co. also moved for summary judgment; Crane, CBS Corp., and Foster Wheeler also filed motions in limine to preclude the testimony of the plaintiffs' expert, Dr. Steven Markowitz. The court denied the summary judgment of Foster Wheeler

The decedent provided deposition testimony over the course of five days. While on board the *USS Roan*, he worked the valves controlling the amount of water going to the boilers, and also lit and cleaned the burners. The court provided a lengthy summary of decedent's testimony. Pursuant to a naval contract, Foster Wheeler furnished four Babcock and Wilcox boilers for the ship. The plaintiffs argued Foster Wheeler supplied asbestos gaskets, rope, and

tape for use in the boiler and the plaintiff's naval expert, Captain Moore, testified that the decedent was exposed to asbestos from replacement gaskets.

Drawings showed that Crane valves were present where the decedent worked, including on the Foster Wheeler boilers. The plaintiff argued that Crane specified the use of asbestos in boiler check valves; Crane argued the drawings relied upon by the plaintiff were made to comply with Navy specifications, not Crane specifications.

The court applied maritime law to the plaintiff's claims. First, Foster Wheeler argued it was entitled to summary judgment pursuant to the government contractor defense, which protects independent contractors from tort liability associated with their performance of government contracts. In this case, for this defense to apply, Foster Wheeler must show that its failure to warn resulted from a discretionary decision by the Navy; Foster Wheeler cannot generally claim the Navy had control over the project. Foster Wheeler's conclusory statements that the Navy required it to provide boilers were insufficient to create a question of fact.

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

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

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

Read the full decision here.

Pleadings Challenge Decisions

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

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

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

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

Read the full decision here.

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

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

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

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

Read the full decision here.

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

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

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

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

Read the full decision here.

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

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

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

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

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

Read the full decision here.

Remand/Removal Decisions

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

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

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

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

First, removals shall be filed within thirty days after receipt by the defendant, through service or otherwise, a copy of the initial pleading setting forth the claim for relief. If the initial pleading does not set forth a basis for removal, defendants must remove within thirty days after receiving an amended pleading, motion, order or other paper from which it may be ascertained that the case is removable. 28 U.S.C. § 1441(b)(1), § 1441(b)(3). The plaintiffs argued the thirty-day removal period started on August 11, 2014, when they filed the interrogatory responses. Rockwell contended it learned of plaintiffs' suit during a routine docket search on August 14, 2014, and was served on

September 3, 2014. Reading § 1441(b)(1) and (b)(3) together, the plain language indicated that subsection (b)(3) did not apply unless a defendant had already received the initial pleading. For an "other paper" to trigger the thirty-day period, Rockwell must have received the "other paper" after or at least with the initial pleading. Since Rockwell received both the complaint and interrogatories on August 14, its removal by September 15 was timely.

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

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

Read the full decision here.

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

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

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

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

Read the full decision here.

Cause Remanded to State Court After Federal Officer Defendants Dismissed

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

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

Read the full decision here.

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

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

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

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

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

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

Read the full decision here.

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

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

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

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

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

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

Read the full decision here.

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

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

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

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

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

Read the full decision here.

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

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

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

The Magistrate remanded to state court. The plaintiff appealed and the District Court on appeal, "pierced the pleadings", and reversed finding that Graves and Taylor had been improperly joined. On appeal, the U.S. Court of

Appeals first analyzed whether the order of the magistrate was a non-dispositive or dispositive matter, i.e., which standard of review would be used. Relying on *Gomez v. United States*, 490 U.S. 858, 863-64 (1989), the court concluded that the order of remand was dispositive and review would be de novo because "constitutional lines" were approached by the magistrate's order and that in some instances a federal court may not review a case de novo during its entire time in federal court.

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

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

Read the full decision here.

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

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

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

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

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

The court found many of the plaintiffs' arguments to be an "insult" to Judge Robreno. Specifically, the court stated that lack of diversity does not destroy subject matter jurisdiction. Although the plaintiff cited cases where the court was unable to maintain supplemental jurisdiction, the court pointed out that those cases involved claims where the basis for federal jurisdiction was absent. The instant case was based on valid federal jurisdiction of federal officer removal. Further, the court discussed that dismissal of federal claims does not negate subject matter jurisdiction. The court agreed with the plaintiff that no federal questions remained but pointed out that the plaintiffs failed to submit any authority that the court loses subject matter jurisdiction as a result. Although the court has the discretion to decline its exercise of supplemental jurisdiction, the court found it was not proper to do so in this case. The court relied on the decision in *Batiste v. Island Record Inc.,* 179 F.3d 217 (5th Cir. 1999). This case, like Batiste, had been pending for a long time, had dispositive motions granted, and dealt with no complex or "novel" issues. Accordingly, there was no reason for the court to not exercise supplemental jurisdiction. Further, the court found the plaintiffs argument that the Court never had subject matter jurisdiction to be "outrageous." The court noted in particular that the Eastern District of Pennsylvania had already decided the issue of subject matter jurisdiction on two occasions when the plaintiff motions

to remand were previously denied. The court also cited that the "principle purpose of MDL is to avoid piecemeal litigation." Accordingly, the court found nothing justifying the plaintiffs request to vacate the prior decisions or remand.

Read the full decision here.

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

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

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

Although the removal statute requires removal within 30 days from date of service of the complaint, the defendant relied upon two arguments that removal was proper. First, the defendant contended that the amendment of the complaint adding the wrongful death and survival claims reset the clock for purposes of removal. The court was not persuaded and reminded that courts are to strictly construe against removal based on jurisdiction. In fact, the court cited the Ninth Circuit's decision in *McAtee v. Capital One*, F.S.B. 479 F.3d 1143 (9th Circuit 2007). *McAtee* explicitly stood for the proposition that an amendment does not change the commencement date of the action. As a second argument, the defendant relied upon cases including *Groom v. Bangs*, 153 Cal. 456 (1908), which held that adding a wrongful death claim is a new action. The court was not persuaded, and noted that the cases the defendant relied upon "pre-date amendments to California law that a personal injury action did not abate on a person's death." Each case cited by the defendant that did not pre-date was clearly distinguishable from the case at hand. Although the defendant argued that California Code 583.10 requires trial to occur within 5 years after an action is commenced the court was still unpersuaded. The defendant relied upon *Brumley v. FDCC California, Inc.* 156 Cal. App. 4th 312, 67 Cal. Rptr. 3d 292 (2007), which held that a newly added wrongful death claim did not have to be tried within 5 years of the filing of the original complaint.

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

Read the full decision here.

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

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

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

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

On appeal, from the U.S. District Court, the U.S. Court of Appeals for the Fifth Circuit analyzed federal removal on a three prong test. The court quickly dispensed of the first requirement and found the shipyard as a "person" within the meaning of the removal statute. The vourt noted the U.S. Supreme Court's prior recognition of corporate entities as being a "person" for purposes of the statute. The second prong of the test dealt with a factual analysis of whether the federal government was indeed directing the defendant's conduct which resulted in the plaintiff's specific injuries. The District Court concluded that no causal connection existed between the two elements of the first prong, and, therefore, did not consider the third prong, whether or not the defendant had a colorable federal defense. The Appellate Court agreed with the District Court's finding that the requirement to use asbestos insulation did not

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

Read the full decision here.

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

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

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

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

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

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

Read the full decision here.

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

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

In this case, the plaintiff alleged exposure through his father's work close from 1953 through the 1970s. The plaintiff's father worked at the Exxon Baton Rouge facility. The plaintiff also claimed exposure to asbestos as an adult while

working as a carpenter at various residential construction sites and as a contractor at Exxon between 1965 through 1978. Defendant Exxon removed the action to federal court based on diversity with the consent of defendants Georgia-Pacific, LLC and Union Carbide Corporation . The plaintiff subsequently moved to remand.

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

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

Read the full decision here.

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

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

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

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

Read the full decision here.

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

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

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

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

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

Read the full decision here.

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

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

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

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

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

Read the full decision here.

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

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

In this case, Asbestos Corporation, Ltd. (ACL) removed the action to federal court on the ground of diversity. The plaintiffs moved to remand, arguing that ACL removed the action past the one year deadline to do so. ACL responded that the missing of the deadline to remove is excused since the plaintiffs acted in bad faith by maintaining a claim against a non-diverse defendant, J.T. Thrope & Sons, Inc. (JTTS), to prevent removal. The plaintiffs responded that they were active in prosecuting those claims in good faith.

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

eyewitness that could save their case against JTTS. Under the circumstances, these affirmations by counsel and the investigator regarding their efforts to obtain the key evidence they lacked suffice to defeat Defendant's bad faith claim."

Read the full decision here.

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

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

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

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

Read the full decision here.

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

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

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

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

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

The magistrate applied the standard that defendants must only put forth a "plausible colorable defense to meet the requirements of removal," and quoted prior case law: "Although the evidence provided by [the defendant] may ultimately prove insufficient to support its defense on the merits, the Court finds that Plaintiffs overestimate the demands of § 1442 at this stage of the proceedings. To establish jurisdiction under § 1442, [the defendant] need not prove its defense but need only show that it has the underpinnings of a valid federal defense."

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

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

Statute of Limitations Decisions

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

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

In this asbestos personal injury action the plaintiffs allege that Arlene Feinberg contracted mesothelioma because of exposure to asbestos-contaminated talc from defendant Colgate-Palmolive Company's Cashmere Bouquet. Colgate moved for summary judgment, arguing 1) the plaintiffs' action is barred by the statute of limitations; 2) the plaintiffs failed to exclude other potential causes of Ms. Feinberg's mesothelioma; 3) the plaintiffs failed to prove that Cashmere Bouquet caused the mesothelioma; and 4) that there is no evidence of general or specific causation. The plaintiffs opposed summary judgment, arguing that Colgate failed to prove that the action was time-barred because Ms. Feinberg's symptoms were too isolated or inconsequential to trigger the statute of limitations. The plaintiffs further asserted that they did not bear the burden on summary judgment to exclude other potential causes of a plaintiff's illness. Rather, Colgate has the burden of proof on summary judgment to demonstrate that Cashmere Bouquet could not have caused the injury and it failed to do so. Finally, the plaintiff argued that the causation issue was foreclosed in prior decisions. The court agreed with the plaintiffs on all issues, and denied summary judgment.

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

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

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

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

Read the full decision here.

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

(Superior Court of Pennsylvania, January 12, 2016)

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

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

Read the full decision here.

Statute of Repose Decisions

Boiler Manufacturers Obtain Summary Judgment Based on Statute of Repose

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

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

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

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

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

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

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

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

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

Read the full decision here.

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

(Supreme Court of Indiana, March 2, 2016)

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

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

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

Read the full decision here.

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

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

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

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

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

Read the full decision here.

Summary Judgment Decisions

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

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

In this asbestos personal injury action the plaintiffs allege that Arlene Feinberg contracted mesothelioma because of exposure to asbestos-contaminated talc from defendant Colgate-Palmolive Company's Cashmere Bouquet. Colgate moved for summary judgment, arguing 1) the plaintiffs' action is barred by the statute of limitations; 2) the plaintiffs failed to exclude other potential causes of Ms. Feinberg's mesothelioma; 3) the plaintiffs failed to prove that Cashmere Bouquet caused the mesothelioma; and 4) that there is no evidence of general or specific causation. The plaintiffs opposed summary judgment, arguing that Colgate failed to prove that the action was time-barred because Ms. Feinberg's symptoms were too isolated or inconsequential to trigger the statute of limitations. The plaintiffs further asserted that they did not bear the burden on summary judgment to exclude other potential causes of a plaintiff's illness. Rather, Colgate has the burden of proof on summary judgment to demonstrate that Cashmere Bouquet could not have caused the injury and it failed to do so. Finally, the plaintiff argued that the causation issue was foreclosed in prior decisions. The court agreed with the plaintiffs on all issues, and denied summary judgment.

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

effusion that she experienced prior to February 28, 2008 was in fact symptoms of malignant mesothelioma or, whether the symptoms related to another illness."

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

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

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

Read the full decision here.

Summary Judgment Reversed Where Court Finds Genuine Dispute as to Fraudulent Transfer of Assets

(Court of Appeals of Wisconsin, District Four, June 23, 2016)

The plaintiff filed this personal injury lawsuit under theories of negligence and strict liability following the death of her husband from mesothelioma. The plaintiff maintained that her husband was exposed to asbestos-containing products allegedly manufactured and/or sold by Fire Brick Engineers Company, Inc. (FBE Company) from approximately 1963-69. In approximately 1983, Fire Brick Engineers Corporation (FBE Corporation), whose investors included attorneys who had previously represented FBE Company, purchased the assets of FBE Company and eventually changed its name to Fire Brick Engineers Company, Inc. In the late 1980s, FBE Company, Inc. merged with Power Holdings, Inc. FBE Company, Inc. and Power Holdings, Inc. were sued in the case as successors to FBE Company.

The defendants moved for summary judgment, arguing that there was insufficient evidence that they distributed or sold any asbestos-containing products and, further, that "although they acquired the assets of FBE Company, there was no basis upon which to impose liability…as successors of FBE Company." The motion included an affidavit from a representative of Powers Holdings, Inc. and a copy of the 1983 purchase agreement, which provided that FBE Corporation agreed to assume certain of the liabilities and obligations of FBE Company, but none which pertained to asbestos. Specifically, there was a provision that FBE Corporation "does not…assume or agree to pay or perform any other liabilities or obligations of [FBE Company] of any kind, whether or not related to the Subject's Business, all of which liabilities and obligations remain the sole responsibility of [FBE Company]." The circuit court granted the defendants' motion for summary judgment, and the plaintiff appealed.

On appeal, the plaintiff maintained that there was a factual dispute as to the application of an exception to the general rule in Wisconsin against successor liability; particularly, whether the sale of FBE Company's assets to FBE corporation was fraudulent because it was executed to avoid FBE Company's potential asbestos liability. The Court of Appeals agreed and determined that the issue was governed by Wisconsin's Uniform Fraudulent Transfer Act at Wis. Stat. § 242.04(1)-(2), which deals with actual intent. According to the Court, "the issue of intent is generally not readily susceptible of determination on summary judgment." It concluded that, viewing the facts in the light more favorable to the plaintiff, a jury could reasonably infer that FBE Company intended to sell its assets to FBE

Corporation to avoid future liability from the sale and manufacture of asbestos-containing products — particularly given the evidence that a director of, and attorneys for, FBE Company were the buyers of FBE Company's assets.

The judgment of the circuit court was reversed and the case remanded for further proceedings.

Read the full decision here.

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

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

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

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

In its motion to exclude, Trinity argued the trial judge should strike Dr. Liuzza's opinion on medical causation because the methodology used in reaching his opinion was flawed in two respects. First, Trinity pointed out that, while he acknowledged that cigarette smoking is the leading cause of lung cancer, Dr. Liuzza nevertheless did not know about, and thus did not consider, Mr. Boudreaux's thirty-year history of smoking three packs of cigarettes a day. Second, Trinity noted that Dr. Liuzza formed his causation opinion without any underlying evidence regarding the dosage of asbestos received by Mr. Boudreaux via occupational exposure. Trinity claim, in a normal case, a plaintiff's pathologist is not qualified to calculate asbestos dosage and so will rely upon the opinion of the plaintiff's industrial hygienist when forming his opinion on causation. In this case, Trinity notes, Dr. Liuzza formed his opinion without the benefit of an industrial hygienist's dosage report, but relied instead upon twenty-five pages excerpted from the 108-page deposition of Terry Thibodeaux, one of Mr. Boudreaux's co-workers. Based on these excerpts, Dr. Liuzza assumed that Mr. Boudreaux was exposed to asbestos on a near-daily basis. When asked at deposition, however, about various work-related factors that could impact the extent of Mr. Boudreaux's historical exposure, factors discussed by the co-worker in the 83 pages of deposition not provided to him, Dr. Liuzza conceded that he would have to defer to an industrial hygienist.

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

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

Read the full decision here.

Ninth Circuit Reverses Summary Judgment for Pump Defendants on Evidence of Supply of Asbestos Containing Gaskets and Packing to U.S. Navy

(U.S. Court of Appeals for the Ninth Circuit, June 16, 2016)

John H. Boyd, III, as the representative of the plaintiff and appellant Captain John H. Boyd, Jr. (deceased), appealed to the Ninth Circuit the District Court for the Central District of California's granting of summary judgment in favor of Warren Pumps, LLC, and Air and Liquid Systems Corporation (successor in interest to Buffalo Pumps, Inc.) in this diversity products liability action. In this case, it was alleged that exposure to asbestos from the appellees' products during Captain Boyd's service on board the U.S. Navy's USS Gainard and USS McCain in the 1950s caused Captain Boyd to develop mesothelioma.

The Court of Appeals affirmed the district court's grant of summary judgment on the ground that Captain Boyd failed to present evidence sufficient to link Buffalo Pumps or Warren Pumps to asbestos-containing replacement parts to which Captain Boyd was exposed during his service onboard the USS Gainard. The court noted that the defendants could only be held liable for exposure to asbestos-containing products that were either manufactured or supplied by them under *O'Neil v. Crane Co.*, 266 P.3d 987, 1005 (Cal. 2012). However, the court reversed and remanded the granting of summary judgment as to the alleged exposures aboard the USS McCain.

The appellants alleged that Captain Boyd was exposed onboard the USS McCain to asbestos from spare packing and gaskets provided with original pumps supplied to the Navy by Buffalo Pumps and Warren Pumps. The Court of Appeals found that the circumstantial evidence raised more than a mere possibility that he was exposed to asbestos-containing spare parts supplied by the defendants either during the initial servicing of the pumps or when those spare parts were removed and replaced during the second servicing of those same pumps. The court found especially notable that there was evidence that the pumps and valves at issue were shipped from the manufacturer to the Navy with asbestos packing or gaskets. The court also found: "Captain Boyd's showing on this point is bolstered by the declarations of retired Naval engineering officer Francis J. Burger, which state that, as Navy equipment vendors, equipment manufacturers like Buffalo and Warren Pumps more likely than not supplied with a new pump at the time it was sold to the United States Navy spare asbestos-containing packing and gaskets that were designed for use with that original pump."

The court concluded that a jury could reasonably conclude that Captain Boyd was exposed onboard the USS McCain to asbestos-containing spare packing and gaskets supplied by Buffalo and Warren Pumps.

Read the full decision here.

Court Declines to Address Causation Standard In Upholding Summary Judgment on Trial Court's Less Burdensome Standard

(Supreme Judicial Court of Maine, June 7, 2016)

Plaintiff Patricia Grant and the Estate of Edward Grant appealed from summary judgments entered against them on their complaint for damages for Edward Grant's lung cancer and death based on negligence, failure to warn of defective, unreasonably dangerous goods, and loss of consortium. Summary judgment was granted on the motions of New England Insulation Company (NEI); Foster Wheeler, LLC; Warren Pumps, LLC; and IMO Industries, Inc. The plaintiff's decedent Edward Grant worked for Beth Iron Works from 1964 to 1970 and again from 1978 to 1994 in a variety of positions, including as a ship cleaner. Cleaning included sweeping up debris — sometimes including asbestos — that resulted from construction and maintenance activities. At his deposition, Grant testified that he believed he was exposed to asbestos as a cleaner between 1966 and 1967, during which time he recalled sweeping up asbestos resulting from pipe covering work but he was unsure if he was exposed to asbestos at other times.

NEI, Foster Wheeler, Warren, and IMO filed motions for summary judgment on the basis that the plaintiff had not established a prima facie case that Grant ever breathed asbestos from the defendants' products. The trial court granted these motions and the plaintiffs appealed arguing that the court erred in its decision.

The Supreme Judicial Court of Maine reviewed and upheld the granting of the motions for summary judgment. The court was faced with the question of what amount of product exposure a plaintiff's evidence must demonstrate to survive summary judgment. The trial court required plaintiff to show that the defendant's asbestos-containing product was at the site where the plaintiff worked or was present, and that the plaintiff was in proximity to that product at the

time it was being used. The court compared that standard to the Lohrmann "frequency, regularity, and proximity test," which requires that there must be "evidence of exposure to a specific product on a regular basis over some extended period of time in proximity to where the plaintiff actually worked" in order to support a reasonable inference of substantial causation. The court, however, did not reach the question of the appropriate standard as it found that the plaintiff's evidence did not meet even the less burdensome standard stating "because we conclude that [plaintiff] has not offered evidence to satisfy even the less burdensome standard applied by the trial court, we need not decide whether Maine should utilize the greater Lohrmann standard."

Read the full decision here.

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

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

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

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

Westinghouse filed a motion *in limine* to exclude Dr. Vance and argued his opinion as to Micarta "is grounded in neither sufficient facts nor data, is not the product of reliable principles and methods, and contains that would assist the trier of fact." Upon reviewing the only available support for Dr. Vance's opinion, plaintiff's deposition testimony, the court found the plaintiff's testimony as inconclusive, at best, on the alleged asbestos content of Micarta. Consequently, the court concluded Dr. Vance's opinion rests only upon an unwarranted assumption rather than "sufficient facts or data," as required by the Federal Rules of Evidence, Rule 702(b) and Dr. Vance's opinion that the plaintiff was exposed to asbestos by working with Micarta was excluded from the case.

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

Read the full decision here.

Court Denies Plaintiff's Motion for Reconsideration on Grant for Summary Judgment in Determination That Defendant Did Not Qualify as "Apparent Manufacturer"

(Court of Special Appeals of Maryland, May 31, 2016)

The plaintiff, Harriette Stein, personal representative of the Estate of Carl Stein, filed an amended complaint with claims against defendant Pfizer under the theory that the decedent's exposure to an asbestos-containing refractory cement, called "Insulag," which was supplied to the decedent's employer, Bethlehem Steel, by Pfizer's subsidiary, Quigley Company, Inc., was a substantial factor in the decedent's illness and eventual death from mesothelioma. The plaintiff alleged that Pfizer was the "apparent manufacturer" of this product because Quigley's invoices and marketing materials bore Pfizer's trademarks, as well as its own; the words "Manufacturers of Refractory Products" appeared beneath the exhibition of those corporate designations; and Pfizer had, in effect, held itself out as a "manufacturer" of Insulag.

The Baltimore City Circuit Court granted Pfizer's motion for summary judgment and determined that Pfizer did not qualify an "apparent manufacturer" under Maryland Law. The plaintiff filed a motion for reconsideration on the issue while also requesting the Court of Special Appeals of Maryland take judicial notice of additional documentary evidence, which it claims, contradicts Pfizer's contention that, both before and after its 1968 acquisition of Quigley,

the marketing and promotional materials of Quigley included the plural designation “Manufacturers of Refractory Products.” The court declined to do so, as the plaintiff did not claim they did not have the opportunity to present this evidence previously.

Upon review of the history of “apparent manufacturer” doctrine, the court noted three tests emerged from case law for determining whether an entity may be found to be an “apparent manufacturer”: objective reliance test; actual reliance test; and the enterprise liability test, as set forth in Restatement (Third) of Torts: Products Liability, Sec. 14. cmt. a (1998). The objective reliance test is followed by a majority of state and federal appellate courts in determining reliance, that is, whether a reasonable consumer would have relied upon a label or advertising materials of a product in purchasing it. For the actual reliance test, the plaintiff must prove that he or she actually and reasonably relied upon the reputed apparent manufacturer’s trademark, reputation or assurances of product quality, in purchasing the defective product at issue. The standard of the enterprise liability test is whether the defendant participated substantially in the design, manufacture, or distribution of the defective product at issue and that the defendant’s trademark appeared on the product. It’s important to note that the enterprise liability test only applies to trademark licensors.

The Court of Special Appeals of Maryland affirmed the circuit court’s grant of summary judgment and concluded that the plaintiff failed to make its case that, under any of three tests, Pfizer should be deemed an “apparent manufacturer” of Insulag. Most notably, the court found all of the evidence indicated, both before and after its acquisition by Pfizer, Quigley manufactured and designed Insulag and sold it to Bethlehem Steel, without any significant participation by Pfizer. It was also noted that evidence established that Quigley shipped the product directly to Bethlehem Steel and Pfizer did not design, manufacture, or distribute Insulag, and that Insulag was manufactured by Quigley long before its acquisition by Pfizer.

Read the full decision here.

Boiler Manufacturers Obtain Summary Judgment Based on Statute of Repose

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

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

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

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

Summary Judgment Granted to Various Defendants For Lack of Product Identification Despite Inclusion in Interrogatory Responses in Take-Home Exposure Case

(New York, Supreme Court, Erie County, May 26, 2016)

In this case, it was alleged that the decedent was exposed to asbestos from laundering her husband, Eugene Blamowski's, work clothes. Mr. Blamowski worked as a laborer at Bethlehem Steel from 1955-84, with the exception of his Army service from 1958-62. He and the decedent were married in 1965 and the decedent had laundered his clothes since that time. Several defendants, including Frontier Insulation Contractors, Beazer East, Riley Power, Inc., and Buffalo Pumps, Inc., moved for summary judgment based on lack of product identification and argued that Mr. Blamowski could not show he was exposed to their products or work.

The court granted all of the motions. The decedent had died prior to testifying, but prior to her death she signed interrogatory responses listing, either upon her information and belief or her attorney's information and belief, moving the defendants' names. During his deposition, Mr. Blamowski admitted that his wife never visited him at the plant and he did not identify any of the moving defendants or their products. In opposition to the motions, the plaintiff's counsel relied upon invoices, prior discovery responses and deposition testimony of other Bethlehem Steel workers. The court found that all the defendants had shifted the burden to the plaintiff, since some were improperly named in the interrogatory responses and others had demonstrated an absence of proof. Regarding the interrogatory responses, the court cited the Matter of Eighth Jud. Dist. Asbestos Litig. [Gorzka] 28 AD 3d 1191 (2006) and held: "[T]he failure of plaintiffs to name [defendant] as a supplier in their responses to interrogatories constitutes an admission that [defendant] was not a source of an asbestos-containing product to which plaintiff was exposed and [defendant] thus established that plaintiff's action against it has no merit." Regarding the evidence the plaintiff relied upon in opposition to the motions, the court cited *Diel v. Flintkote Co.*, 204 AD2d 53 (1st Dept. 1994) and held: "It is insufficient to show that a defendants' products were "'… .seen in the plant; it must be shown that plaintiff was exposed to asbestos fibers released from defendant's products."

Read the full decision here.

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

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

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

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

Under Georgia law, an asbestos plaintiff must present evidence of exposure to asbestos-containing products for which the defendant was responsible. Here, a reasonable jury could conclude that the decedent was exposed to asbestos-containing dust from gaskets being replaced and used with Crane valves. However, there was no evidence that these replacement parts were supplied by Crane. Thus, the plaintiffs failed to show that decedent's injuries were caused by asbestos parts supplied by Crane.

The plaintiffs argued that Crane was still liable because it negligently designed its valves to require the use of asbestos parts, and Crane failed to warn of the dangers of asbestos. Both of these arguments failed because the plaintiffs did not produce evidence of causation. The plaintiffs' injury must be the proximate result of a defect in the product which existed at the time sold. Here, the record does not show the type of Crane valve the decedent was exposed to, what the valve was used for, or whether the design of that valve specified the use of asbestos to function properly. Further, Crane's corporate representative testified that Crane valves did not require asbestos parts to properly function. "The mere fact that the gaskets on Crane Co. valves were replaced with asbestos-containing

gaskets from third party vendors does not mean that Crane Co. designed and specified the use of only asbestos-containing gaskets for those valves, or that those valves required asbestos-containing gaskets to function … Without evidence demonstrating that Thurmon was exposed to a negligently designed Crane Co. valve (i.e. a valve that required asbestos-containing gaskets to function properly), a jury would be forced to speculate that Crane Co.'s negligence proximately caused Thurmon's injuries. However, "[s]peculation does not create a genuine issue of fact.'" Further, a successful failure-to-warn claim likewise requires causation, which plaintiff failed to establish.

Read the full decision here.

Summary Judgment Granted to Cleaver Brooks Because Vague Witness Testimony Not Enough to Establish Exposure

(U.S. District Court for the Southern District of California, May 24, 2016)

The decedent in this case, Michael Walashek, alleged exposure to asbestos from various products, including Cleaver-Brooks boilers, during the course of his work for various entities between 1967 and 1986. The exposure allegedly caused him to "suffer severe and permanent injury and ultimately death." The plaintiff, Gail Walashek, subsequently filed a lawsuit against the defendant Cleaver-Brooks, Inc. and other entities alleging claims of negligence and strict liability in the U.S. District Court for the Southern District of California. Following discovery, the defendant moved for summary judgment, alleging that the plaintiff failed to establish "some threshold exposure" to its asbestos-containing boilers.

The District Court granted summary judgment in favor of the defendant. In doing so, the District Court cited, *inter alia*, the the following: (1) testimony of a former superior of the decedent who recalled sending him to work on the defendant's boilers somewhere in Eastern Washington "but could not recall" the specific job sites; (2) another witness' testimony about working on boilers with the decedent at an Ore-Ida potato factory who testified that he would be "guessing" the boiler brand they worked on there; and (3) a third witness' testimony about a "vague memory" of the defendant's boilers being on Coast Guard ships he worked on along with Decedent. Based on the summarized evidence, as well as vague interrogatory responses on exposure, the District Court found that the defendant carried its initial burden of production. The District Court then noted that the plaintiffs failed to produce enough evidence to generate an issue of material fact, which the plaintiffs had largely based on the Coast Guard ship "vague memory" testimony. It was found that the ship testimony was "not of 'sufficient quality to allow the trier of fact to find the underlying fact [of threshold exposure to asbestos attributable to the defendant] in favor' of Plaintiffs."

Read the full decision here.

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

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

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

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

GE moved *in limine* to exclude Dr. Vance's testimony regarding the plaintiff's exposure to asbestos from GE marine turbines on the basis that Dr. Vance's opinions were untimely and improperly disclosed pursuant to Rule 26 of the Federal Rules of Civil Procedure, which requires a complete disclosure all expert opinions pursuant to the scheduling order. The court found that Dr. Vance's opinion regarding GE marine turbines was untimely and was neither substantially justified nor harmless — such that exclusion of the opinion was an appropriate remedy pursuant to Federal Rule 37.

Additionally, GE argued that Dr. Vance's testimony was inadmissible per Federal Rule of Evidence 702 because it lacked a sufficient factual basis. In opining that the plaintiff was exposed to asbestos from GE wire, Dr. Vance had specifically relied upon testimony by the plaintiff that the plaintiff believed GE wire contained asbestos. Dr. Vance had no knowledge regarding the asbestos content of GE wire or the type of asbestos, if any, that was in the GE wire. Dr. Vance had not seen or reviewed any documentation indicating that GE wire actually contained asbestos during the relevant time period. The court agreed that Dr. Vance's opinion was, indeed, based on insufficient facts or data and was therefore inadmissible.

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

Read the full decision here.

Summary Judgment in Favor of the U.S. Government Reversed as Finder of Fact Could Reasonably Conclude Naval Facility Asbestos Exposure was Substantial Factor in Causing Plaintiff's Mesothelioma

(U.S. Court of Appeals for the Ninth Circuit, May 16, 2016)

Plaintiff Roger Botts, a former deliveryman who developed mesothelioma after being around work which exposed him to asbestos, including the removal, installation, and fabrication of asbestos on board ships and around the Puget Sound Naval Shipyard between 1970 and 1976, sued the United States Government in the U.S. District Court for the Western District of Washington. The government subsequently filed a motion for summary judgment asserting that the plaintiffs had not proven causation. In granting summary judgment, the District Court found that the plaintiffs failed to produce from which a finder of fact could reasonably conclude "that asbestos exposure at the Puget Sound Naval Shipyard…resulting from violation of the Navy's mandatory rules [as to the containment of asbestos] after March 1970 was a substantial factor in causing Roger Botts' mesothelioma." The plaintiffs' appealed the District Court ruling.

On appeal, the U.S. Court of Appeals for the Ninth Circuit reversed the District Court's ruling. In doing so, the Ninth Circuit found that the plaintiffs did, in fact, produce evidence from which a finder of fact could reasonably conclude that Roger Botts' exposure to asbestos at the Puget Sound Naval Shipyard following violations of the Navy's mandatory rules after March 1970 was a substantial factor in his getting mesothelioma. The Ninth Circuit pointed to several points of evidence in the record in support of its position, including that "Navy personnel did not comply with the containment regulations [for asbestos] after they came into effect in March 1970, and that, had the containment regulations been complied with, the volume and spread of asbestos fibers on ships due to just removal and cleanup activities would have been reduced by 90%[,]" that asbestos removal, installation, and fabrication "took place both on board ships and around the shipyard while Botts made deliveries to the shipyard from 1970 to 1976[,]" that violations of the Navy's asbestos containment regulations began in March 1970, and there is evidence that, from 1970 to 1976, Botts spent as much as 20 percent of his working time each year at the shipyard, and that, relatedly "[t]here was expert testimony that working for less than a year in total in a shipyard during [that] time period could result in anywhere between a two- to-eight-fold increase in the risk of developing mesothelioma due to asbestos exposure." Accordingly, the Ninth Circuit found that the plaintiffs provided sufficient evidence of causation, reversed the District Court's grant of summary judgment, and remanded the case for further proceedings.

Read the full decision here.

Trial Court Denies Mechanical Contractor's Motion for Summary Judgment Opposed by Co-Defendants

(Supreme Court of New York, New York County, May 5, 2016)

The plaintiff sued the defendants for his mesothelioma allegedly contracted from his work at the Northpoint Power Station in Northport, Long Island. Mechanical contractor, O'Connor, moved for summary judgment as to the plaintiff's claims and cross claims. The motion was opposed by co-defendants National Grid and National Grid USA Service Company.

O'Connor maintained that summary judgment is appropriate because the plaintiff did not identify O'Connor in his Interrogatories and deposition testimony. However, the co-defendants opposed, stating that their affidavits submitted create a sufficient issue of material fact. Further, the co-defendants pointed out that O'Connor had agreed to a contractual indemnification for wrongful conduct.

The facts told that O'Connor worked on Units 1 and 2 of the powerhouse. The co-defendants argued that the plaintiff's testimony placed him in the boiler room at Units 1 and 2. The plaintiff believed he had been exposed to asbestos while workers were installing water lines nearby. The co-defendants relied heavily upon O'Connor's specific work and monthly progress reports whereby O'Connor had installed and insulated dust collectors. Specifically, the progress reports showed that O'Connor had used asbestos products. O'Connor contends that the reports "do not reflect that plaintiff himself worked at the power station," but rather the reports only show employers who worked there. Further, O'Connor argues that it was not involved with boilers or piping of water lines. Additionally, O'Connor tried to raise inconsistencies in the plaintiff's social security statements. The court rejected this portion of the argument as untimely.

The court reminded that the standard for summary judgment includes submitting supporting affidavits. The court was not persuaded by O'Connor's argument and found that O'Connor tried to use gaps in the plaintiff's testimony to establish no dispute of material fact. Specifically, the court was troubled by O'Connor's lack of affidavit proffering "the dates that O'Connor worked at the power station" and that O'Connor did not submit an affidavit attesting that it did not use asbestos at the powerhouse. Although the court acknowledged that the evidence against O'Connor was weaker than perhaps other co-defendants, the motion was nevertheless denied.

Read the full decision here.

California Appeals Court Applies "Inevitable Use" and Reverses Grant of Summary Judgment as to Brake Arcing Defendant

(Court of Appeal of California, First Appellate District, Division Four, May 9, 2016)

The appellant brought an appeal on behalf of her late husband, Frank Rondon, arguing that the trial court erred in its grant of summary judgment as to her claims for strict liability and negligence. Frank Rondon worked as a mechanic using defendant Hennessy's (Ammco Tools) brake arcing machines designed to grind asbestos brake shoes.

Hennessy moved for summary judgment, arguing that it did not manufacturer, distribute, or design asbestos containing products. Hennessy relied upon expert declarations that non-asbestos brake show linings were available in the 1960s and 1970s. Another expert declaration submitted to the court argued that the arcing machines were designed to grind brake shoes of any composition, not just asbestos brake shoes. Moreover, Hennessy argued that two recent decisions, *Shields* and *Bettencourt*, were different than the instant case because the facts illustrated that the machines were not "designed exclusively to be used with asbestos containing brakes." Appellant opposed the motion for summary judgment, stating that the "inevitable use" of the arcing machines was to grind asbestos. Appellant also submitted declarations that contended that non-asbestos brakes were limited in use prior to 1980. Another declaration included the assertion that Hennessy started to supply an asbestos dust collector bag in 1973. The trial court fund that Rondon could not establish that the grinders were made to be used exclusively and inevitably with asbestos brakes. However, the Appellate Court reversed.

As to the strict liability claim, the Appellate court analyzed several cases, specifically the O'Neil case, and held that O'Neil's "exclusive use" is not required but rather a showing of "inevitable use" is required. The court honed in on the question of whether the intended use would inevitably expose Mr. Rondon to asbestos considering that 95-99 percent of the brakes being grinded contained asbestos. The next question becomes whether that created a hazardous condition according the court. The court concluded that the "normal" operation of the grinders inevitably caused the release of asbestos dust. The court also analyzed the *Tellez-Cordova* decision and pointed out that in O'Neil the products at issue, valves and pumps, did not necessarily create the dust that injured the claimant in that matter. However, in the instant case, the equipment itself, i.e., the defendant's grinders created the dust. Also relying on a decision from *Sherman*, the court noted that an economic benefit was gained by Hennessy for the use of its product. Consequently, Rondon should be permitted to prove her claims that Hennessy is strictly liable for the hazardous condition.

As for the negligence claims, the court outlined seven factors it reviews to determine whether a duty of care exists. The Appellant relied heavily on foreseeability, the first factor. The court stated that Hennessy "knew that the normal and intended use of its grinders was to grind brake linings, the vast majority of which contained asbestos" and concluded foreseeability in the Appellant's favor. Hennessy argued that the third factor, the connection between

Hennessy's conduct and Rondon's injuries was tenuous. Despite Hennessy's contentions, the court found that a duty of care existed. However, that alone does not render Hennessy negligent according to the court. Factual issues existed that warranted an additional finding by the trial court.

Read the full decision here.

U.S. District Court Denies Plaintiffs' Motion for Reconsideration on Grant of Summary Judgment as to Daubert Challenge, Worker's Compensation Exclusivity, and Public Nuisance Claim

(U.S. District Court for the Western District of Wisconsin, May 5, 2016)

The plaintiffs brought a motion for reconsideration for the court's decision to grant partial summary judgment as to the defendant Weyerhauser's motion as to its Daubert challenge, The plaintiffs' claims for Worker's Compensation Exclusivity and public nuisance claim.

The court stated that Rule 56 does not provide for a motion for reconsideration but permits a motion to alter judgment. However, the standard requires the movant to show a "manifest error" in judgment or that newly discovered evidence is available. The court noted that the rule is not meant to allow parties to re-litigate matters. Instead, the rule is designed to prevent a flurry of motions similar to ones that the plaintiffs' counsel had filed.

As for the Daubert challenge, the plaintiffs argued that the court erred in its view of the evidence as to certain the plaintiffs' exposure to asbestos as a result of take home exposure from family members' work clothes. One specific plaintiff challenged the court's finding that his delivery of milk to a dairy near the plant at issue for seven days a week for twelve years was insufficient for the plaintiffs' experts to opine that his exposure was substantial contributing factor in the development of his alleged disease. The court noted that the plaintiffs' experts lacked epidemiological studies and therefore had no foundation for the plaintiffs' experts to testify that his deliveries would have exposed him to levels sufficient to rise to substantial contributing factor. Additionally, the court found that the plaintiffs did not address substantial contributing factor but rather relied on the plaintiff's alleged exposures as a "factor." Finally, the plaintiffs contended that the court erred in its interpretation of substantial contributing factor. Relying on the *Zelinski* case, the court found no error.

The court then reviewed the plaintiffs' argument that summary judgment should not have been granted as to the Worker's Compensation Exclusivity Provision. The plaintiffs argued that the court should not have limited its review to the exposures of the actual worker who was alleged to have brought asbestos home on his clothes but rather should have extended its review to the family members too. At best, the court found the plaintiffs' contentions confusing and declined to extend the review to the family members as it found that the provision was limited to occupational exposure only.

Finally, the court reviewed the plaintiffs' argument that summary judgment should not have been granted on their public nuisance claim against Weyerhauser. The court quickly dispensed of the argument and found that the plaintiffs failed to preserve that issue because they had not responded to the defendant's contention that required Weyerhauser to have a possessory interest or property right for the nuisance claim to apply. The plaintiffs solely relied on the Restatement of Torts and one case cited in their motion. The court was not persuaded.

The court denied the plaintiffs' motion as to all three issues.

Read the full decision here.

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

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

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

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

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

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

Read the full decision here.

Issue of Foreseeable Duty to be Determined by a Jury in Take-Home Exposure Case Against Plant Where Decedent's Husband Worked

(Court of Appeal of Louisiana, Fourth Circuit, May 4, 2016)

The plaintiffs' decedent, Elizabeth Sutherland, alleged take-home exposure to asbestos from her first husband's work clothes. The plaintiff's first husband, James "Huey" Chustz, worked as an electrician helper for Hershel Leonard Jr. Electric Company from 1964-72. At minimum, he spent 250 days at the sugar mill Alma Plantation, LLC, where he would become covered in dust from coming into contact with pipes. After dismissal of various parties and claims, the only claim remaining against Alma was if it owed a foreseeable duty to the decedent. Alma moved for and was granted summary judgment on this issue and the plaintiffs appealed.

The plaintiffs' appeal was granted. The court reviewed Mr. Chustz's testimony regarding the dirty conditions of Alma and his clothing from working there. The court also reviewed numerous articles presented by the plaintiffs on the dangers of asbestos in the workplace, invoices showing asbestos-containing products purchased by Alma, and the affidavits of industrial hygienist Steve Hays and pulmonary expert Dr. John Maddox. Mr. Hayes' affidavit set forth how Mr. Chustz would have been exposed to asbestos that he would have brought home and Dr. Maddox's affidavit set forth how decedent's "cumulative asbestos exposures caused this lethal malignant pleural mesothelioma."

In its ruling, the court stated: "Plaintiffs presented evidence in opposition to Alma's Motion for Partial Summary Judgment to demonstrate that Mrs. Sutherland may have been exposed to asbestos dust, that her death was caused by an asbestos-related illness, and that there was industrial knowledge of the dangers of asbestos and take home exposure. As noted by the U.S. District Court from the Middle District of Louisiana regarding the Walsh-Healy Act, "the Louisiana Supreme Court has found that the act evidences 'a level of knowledge that pervaded the industry' and shows 'a growing understanding and awareness of a serious problem regarding asbestos.'" *Catania v. Anco Insulations, Inc.*, 05-1418-JJB, 2009 U.S. Dist. LEXIS 107375, 2009 WL 3855468, at *2 (M.D. La. Nov. 17, 2009) [*13], quoting Rando, 08-1163, pp. 28-29, 16 So. 3d at 1086-87. Genuine issues of material fact remain that would assist in determining whether an alleged duty of Alma to Mrs. Sutherland was foreseeable, given the unique facts and circumstances in this case. As such, we find, like the Louisiana Supreme Court found in *Kenney*, that a trial on the merits is necessary and would assist in determining whether Alma owed Mrs. Sutherland a duty. Accordingly, we reverse the judgment of the trial court and remand for further proceedings consistent with this opinion."

Read the full decision here.

Summary Judgment in Favor of Supplier of Insulation Affirmed on Strict Liability, But Reversed on Failure to Warn

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

In this case it is alleged that the decedent, Ian Blandford, was exposed to asbestos while working as a pipefitter from 1955 to 1998. The Edward R. Hart Company (Hart) moved for and was granted summary judgment. The plaintiff appealed.

On appeal the court affirmed the trial court's granting of summary judgment on strict product liability, but reversed the granting of summary judgment on the failure to warn claim. Regarding strict product liability, the court pointed out that Hart was a supplier of asbestos insulation, not a manufacturer. Under Ohio law, a supplier can be strictly liable when the manufacturer of the product is not subject to judicial process in the state and the claimant would be unable to enforce judgment against the manufacture due to actual or asserted insolvency. Owens Corning, the manufacturer of the insulation supplied by Hart, had filed for bankruptcy in 2000. The court held that the bankruptcy did not prevent Owens from being subject to judicial process. Regarding insolvency, the court held: "although Owens Corning voluntarily filed bankruptcy in October 2000, 'today [it] is a fully functioning corporation with a trust worth over $1 billion in assets and $8.9 billion in asbestos reserves.'"

On the failure to warn claim, the court set forth that to hold a defendant liable it must be shown there was a duty to warn, that duty was breached, which proximately caused the injury. A supplier will be held liable if the supplier "(a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and (b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and (c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous." The court went on to review the evidence of the case and held: "appellants pointed to specific evidence establishing that genuine issues of material fact remain regarding (1) Hart's knowledge about the dangers of asbestos, (2) whether Ian was exposed to asbestos-containing products supplied by Hart, and (3) whether those products were a substantial factor in causing Hart's mesothelioma. Accordingly, we find that genuine issues of material fact remain regarding whether Hart was negligent for failing to warn about the dangers of asbestos."

Read the full decision here.

Highest New York Court Refuses to Pierce Corporate Veil, Citing Lack of Evidence Establishing Ford USA's Part in the Chain of Distribution of Ford UK Products

(New York Court of Appeals, May 3, 2016)

The plaintiff alleged exposure to asbestos-containing brakes, clutches and engine parts while working on Ford tractors and passenger cars in Ireland. The plaintiff and his wife brought suit after he developed peritoneal mesothelioma. Ford USA moved for summary judgment, arguing the parts to which the plaintiff alleged exposure were manufactured, distributed and sold by its wholly-owned subsidiary, Ford UK. Ford USA further argued the complaint was devoid of allegations supporting the claim that the court should pierce the corporate veil. While there was no basis for piercing the corporate veil, the Appellate Division nevertheless held that there were factual issues concerning whether Ford USA could be found directly liable and denied Ford USA's motion. The Court of Appeals reversed.

The court summarized the law of strict liability, stating that it is the manufacturer alone who can fairly be said to know and understand when an article is suitably designed and safely made; however, retailers and distributors may also be strictly liable because they have a continuing relationship with the manufacturers and are in a position to exert pressure for improved safety. The plaintiffs argued a question of fact existed concerning Ford USA's role in the chain of distribution, in that the evidence established that Ford USA played a direct role in the design and marketing of asbestos parts. However, the record evidence showed that Ford UK, not Ford USA, manufactured and distributed the Ford tractor and vehicle parts. Although the plaintiff's evidence showed Ford USA providing guidance, this alone was insufficient for strict liability. Further, Ford's world-wide trademark did not contain directives on what warnings, if any, should be placed on packaging.

While Ford USA could exert pressure on Ford UK, this concept had never been applied to a wholly-owned subsidiary, but instead was routinely applied to sellers, as the sellers were in the best position to pressure manufacturers for safer products. "Ford USA, as the parent corporation of Ford UK, may not be held derivatively liable to the plaintiff under a theory of strict products liability unless Ford USA disregarded the separate identity of Ford UK and involved

itself directly in that entity's affairs such that the corporate veil could be pierced…a conclusion that neither Supreme Court nor the Appellate Division reached in this instance."

Read the full decision here.

Summary Judgment Reversed on Appeal for Brake Shoe Grinder Manufacturer on the Basis of Foreseeable Hazard With Inevitable Use and Normal Operation of its Non-asbestos Containing Product

(Court of Appeal of California, First Appellate District, Division One, April 28, 2016)

The plaintiff's decedent, who developed breathing difficulties and lung damage as a result of asbestos exposure, filed a lawsuit in state court alleging that from approximately 1958-62, he was a mechanic who utilized brake shoe arcing machines (known as "grinders") manufactured by the defendant for the purpose of grinding down/reshaping the friction material of brake shoes via mechanical abrasion. When a grinder came into contact with a brake shoe which contained asbestos in is lining, it would release asbestos into the air. Accordingly, it was alleged that the defendant failed to warn about the dangers of using its grinders on asbestos-containing products. The trial court granted summary judgment to the defendant after it established that there was no evidence that its grinders required asbestos-containing brake pads to function and that its grinders worked on all brake linings, regardless of whether or not they contained asbestos. In doing so, the trial court found that the defendant owed no duty to warn of risks created by third parties. The plaintiff appealed alleging that a triable issue of fact had been raised concerning the defendant's failure to warn.

The First Appellate District agreed with the plaintiff and reversed the trial court's ruling. In doing so, it cited a string of recent appellate rulings, some specifically involving the defendant, in which it was found that where the alleged sole and intended purpose of a particular product were one in which a foreseeable hazard resulted, the "inevitable use" and "normal operation" of that product made it reasonable to expect the manufacturer to provide warnings. The cases distinguished between products such as grinders, which "invariably" resulted in the generation of asbestos dust by their ordinary use, and products such as asbestos-containing pumps and valves, the normal operation of which would not "inevitably cause the release of asbestos dust." In support of is position, the First Appellate District noted that it had been established that 90 to 95 percent of the original equipment market brake linings and virtually 100 percent of the aftermarket brake linings contained asbestos as of 1986, more than 20 years after the decedent had reshaped them with grinders. Therefore, even though the defendant noted that some non-asbestos containing brakes were available between 1958 and 1962, "they were only in limited use." The First Appellate District further noted evidence that the grinders "were designed for passenger cars and vehicles, 'the vast majority of which contained asbestos from the 1960's to the mid-1970's.'" It concluded its decision by embracing a policy argument raised in a substantially similar case which held that "[b]ecause the manufacturer derives an economic benefit from use of its product with certain other products, and 'the combined use of the tool with those products inevitably created a hazardous condition, it was fair to require the tool manufacturer to share liability for the resulting injuries.'"

Read the full decision here.

Boilermaker Contractor Granted Summary Judgment Over Past Employee as No Proof Existed of Exposure Outside of His Work Directly for Contractor

(U.S. District Court for the Southern District of California, April 25, 2016)

The plaintiffs filed a wrongful death and survival action claiming their decedent, Michael Walashek, developed mesothelioma from his work as a career boiler maker from 1967-86. The plaintiff's social security records listed his employers FBS, Inc. and Camass Company, along with others. The case was removed to federal court and FBS, Inc. moved for summary judgment. Previously, a gasket manufacturer and cloth manufacturer moved for and were granted summary judgment. A summary of that decision can be found here.

Specially, FBS, Inc. argued that the plaintiffs' claims were barred by California's Workers' Compensation Act and the Longshore and Harbor Workers' Compensation Act. Additionally, FBS, Inc. maintained that the claims were barred by the sophisticated user doctrine. On the other hand, the plaintiffs argued that their decedent was exposed to asbestos by FBS, Inc. while working for co-defendant Camass. Therefore, the claims did not fall within the scope the Workers' Compensation Act with respect to FBS, Inc. as their decedent's alleged exposure occurred while working at Camass by other FBS, Inc. employees.

In granting the motion, the court held that the plaintiff failed to establish a disputed fact "with respect to whether Walashek was exposed to asbestos dust attributable to FBS, Inc. while employed by Camass." The plaintiffs' discovery responses did not purport any facts of exposure regarding FBS, Inc. exposing the plaintiff to asbestos during his work at Camass. The court noted that the burden shifted to the plaintiff. The plaintiff relied on the deposition testimony to attempt to establish that the plaintiff worked around FBS, Inc.'s workers onboard the USS Kitty Hawk and USS Constellation. However, the court found that there was no "reliable evidence" that the plaintiff was present when FBS, Inc. worked on the U.S.S. Kitty Hawk or U.S.S. Constellation. The court honed in on fact testimony from the plaintiff's brother suggesting that FBS, Inc. and Camass did not work together on projects as they were competitors. Also, the court recognized that another fact witness' testimony that multiple contractors may be on a ship simultaneously was speculative.

Accordingly, the court granted FBS, Inc.'s motion for summary judgment.

Read the full decision here.

Federal Court Analyzes New Jersey State Law in Granting Unopposed Summary Judgment Motions of Six Defendants

(U.S. District Court for the District of New Jersey, April 8, 2016)

In this federal court case, the plaintiff, James McCourt, alleged exposure to asbestos from serving in the Navy (1962-66), working as a pipefitter (1961-62 and 1966-68), home renovations (1952-60), automotive repair work (1959-98), and from the clothing of his father from products manufactured by various defendants. Six defendnats, Guard-Line, Inc., CertainTeed Corporation, Union Carbide Corporation, Exxon Mobil Corporation, PSEG Power, and DAP, Inc., moved for summary judgment.

While the plaintiff did not oppose the defendants' motions, the court still analyzed each motion under New Jersey law. In granting all six motions, the court held: "Defendants are entitled to summary judgment because Plaintiffs have failed to show there is any genuine issue of material fact bearing on each Defendants' liability. Plaintiffs have not produced any evidence through documentation or deposition testimony that identifies Guard-Line, CertainTeed, Union Carbide, Exxon, PSEG, or DAP as a source of Mr. McCourt's asbestos exposure. Plaintiffs have thus failed to demonstrate that Defendants manufactured, supplied, or distributed the asbestos-containing products which Mr. McCourt was exposed to on a frequent and regular basis while in a close proximity to it. Accordingly, Plaintiffs cannot establish a prima facie case that any of the Defendants caused or contributed to Mr. McCourt's illness, and Defendants Guard-Line, CertainTeed, Union Carbide, Exxon, PSEG, and DAP are entitled to summary judgment as a matter of law."

Read the full decision here.

Punitive Damages Not Allowed Against Bendix; Memos Showed a Corporation Struggling With Evolving Science on Asbestos and Mesothelioma

(U.S. District Court for the Middle District of North Carolina, April 4, 2016)

The plaintiff alleged that her husband was exposed to asbestos from brakes, and as a result died from mesothelioma. She sued Honeywell International, as successor-in-interest to Bendix, alleging negligence, breach of implied warranty, fraud, failure to warn, and wrongful death, and asked for actual and punitive damages. Bendix moved for summary judgment on the breach of implied warranty, fraud, and failure to warn claims, and punitive damages claims. The court denied summary judgment as to the breach of implied warranty and products liability claims, but granted summary judgment as to the punitive damages and fraud claims.

Regarding punitive damages, the plaintiff argued the lack of adequate warnings and the sale of defective replacement brakes was willful and wanton. Under North Carolina law, in the case of a claim against a corporation, the plaintiffs must demonstrate that officers, directors, or managers condoned the conduct constituting the aggravating factor giving rise to punitives. Here, the court noted: "The internal memos she proffers tend to show a corporation struggling to understand evolving scientific knowledge about asbestos and mesothelioma … and while they do not suggest Bendix was proactive, neither do these internal communications show an active "concealment or misrepresentation of facts regarding the dangers of asbestos in the brakes." Summary judgment was granted on this claim. The plaintiff did not contest the summary judgment motion on the fraud claim, and it was likewise granted.

The plaintiff argued Bendix sold asbestos-containing brakes without adequate warnings, thus breaching the implied warranty of merchantability. The evidence showed that Bendix provided warnings from 1973-86 that breathing asbestos dust could cause serious bodily harm; these warnings did not include asbestosis, lung cancer, or mesothelioma, and there was a factual dispute regarding whether the warnings were prominently located. Although Bendix argued its warnings complied with OSHA standards, this was not conclusive evidence that the warnings were adequate. Thus, a genuine issue of material fact existed. Bendix also moved for summary judgment on negligence due to failure to warn, which was likewise denied.

The plaintiff also alleged a product liability claim based on inadequate design; Bendix argued this claim must fail because the plaintiff did not show a feasible alternative design through competent expert testimony. However, North Carolina law did not require expert testimony to prove defective design, but provided seven non-exclusive factors to consider. While the plaintiff did not produce evidence for all of these factors, she did make a sufficient forecast of evidence to survive summary judgment

Read the full decision here.

Various Bits of Evidence Insufficient to Reverse Grant of Summary Judgment to Four Defendants

(U.S. Court of Appeals for the Fourth Circuit, March 30, 2016)

After the decedent was diagnosed with mesothelioma, he and his wife filed suit against 31 companies alleging asbestos exposure. The case was removed to federal court and transferred to the Eastern District of Pennsylvania MDL. Four defendants — Crane Company, CBS Corporation (Westinghouse), Goulds Pumps, and Air & Liquid Systems Corporation (Buffalo) — were granted summary judgment by the Eastern District of Pennsylvania MDL, and the plaintiff appealed. The Fourth Circuit affirmed.

The decedent was a marine machinist at the Charleston Naval Shipyard from 1972-95, working primarily on pumps and valves. He spent one year as an apprentice in Shop 31, and spent the rest of his time working out of Shop 38, which involved working both in the shop and on board ships.

The defendants first argued the Fourth Circuit lacked jurisdiction because the orders granting summary judgment were entered by the Pennsylvania court. The Fourth Circuit disagreed; the plaintiff did not appeal until the final judgment was entered by the District Court for the District of South Carolina.

Next, the court applied South Carolina law to the plaintiff's state-law tort claims, which consisted of the "frequency, regularity, and proximity" test. Regarding Crane, the plaintiff provided co-worker testimony stating that the decedent worked on Crane pumps. Despite this evidence, the plaintiff did not show that the decedent worked on Crane pumps containing asbestos, and the record was clear in that both asbestos and non-asbestos-containing gaskets, packing, and insulation were used. The only evidence offered by the plaintiff to show that Crane pumps contained asbestos were two advertisements. Regarding Westinghouse, while the plaintiff did show that the decedent worked with and around Westinghouse turbines in Shop 38, this work did not satisfy the frequency/regularity/proximity standard. While there was testimony stating that the removal of asbestos insulation from Westinghouse turbines on board ships created a fog of asbestos dust, this appeal only involved the decedent's work in Shop 38.

Regarding Goulds, the plaintiff relied primarily on circumstantial evidence in attempting to establish exposure; however, finding that the decedent worked with asbestos-containing Goulds products would require sufficient speculation. Finally regarding Buffalo, the plaintiff offered testimony of a co-worker that Buffalo was one of the main manufacturers of pumps. Even construing this to mean that Buffalo pumps were present in the decedent's work space in Shop 38, the plaintiff did not provide any evidence that the decedent worked on these pumps with frequency, regularity, and proximity.

The court stated: "In *Lohrmann*, this court declined to adopt the proposed rule that 'if the plaintiff can present any evidence that a company's asbestos-containing product was at the workplace while the plaintiff was at the workplace, a jury question has been established as to whether that product contributed as a proximate cause to the plaintiff's disease.'" Summary judgment was affirmed.

Read the full decision here.

Summary Judgment Overturned on Statute of Limitation Argument as No Proof Offered Linking Past Disease With Mesothelioma Diagnosis

(Supreme Court of New York, Appellate Division, Third Department, March 31, 2016)

In this take-home exposure case, the plaintiff was diagnosed with malignant epithelial mesothelioma (MEM) on or about August 5, 2010 and commenced her case against various defendants on November 5, 2012. After joinder of issue and discovery, several defendants moved for, and were granted, summary judgment, arguing that the plaintiff's action was time-barred pursuant to CPLR 214-c (2). Under this statute, "the three year period within which an action to recover damages for personal injury . . . caused by the latent effects of exposure to any substance or combination of substances, in any form, upon or within the body . . . shall be computed from the date of discovery of the injury by the plaintiff or from the date when through the exercise of reasonable diligence such injury should have been discovered by the plaintiff, whichever is earlier."

On appeal, the lower court's granting of summary judgment was reversed. The court was not swayed by the affidavit of defendants' expert pathologist that stated that the plaintiff had the same tumor in 2011 as had been discovered in 2003. As the court held: " the pathologist does not state that plaintiff only has the disease that was discovered in 2003 and, therefore, does not exclude the possibility that plaintiff later developed a separate and distinct disease. In addition, inasmuch as the pathologist failed to mention — much less opine on — MEM, there is no expert proof before us indicating what the symptoms of MEM are in order to permit a comparison of the symptoms to the proof regarding plaintiff's medical history."

Read the full decision here.

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

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

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

The court of appeals affirmed the lower court's decision. Regarding the plaintiffs' claims of strict product liability, the court held: "We therefore agree with the district court that McIndoe's heirs cannot sustain an action for strict products liability premised upon the notion that the warships in question are themselves 'products' under maritime law. Accordingly, the heirs may prevail only under a theory of negligence." Regarding the negligence claims, the court rejected the plaintiffs' expert, Dr. Allen Raybin's, every exposure opinion, and held: "Notwithstanding the declaration of Dr. Raybin, McIndoe's heirs failed to put forward evidence demonstrating that McIndoe was substantially exposed to asbestos from the shipbuilders' materials for a substantial period of time. The heirs have established no genuine issue of fact regarding whether any such exposure was a substantial factor in McIndoe's injuries, and thus they cannot prevail on their general negligence claims."

Read the full decision here.

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

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

The plaintiff alleged the decedent was exposed to asbestos while serving in the Navy from 1947-52, and while on board the *USS Charles H. Roan*. Defendants Foster Wheeler and General Electric removed to federal court pursuant to the federal officer statute. Foster Wheeler moved for summary judgment based on: (1) the government contractor defense; (2) bare metal defense; and (3) its products were not a substantial factor in causing injury. Crane Co. also moved for summary judgment; Crane, CBS Corp., and Foster Wheeler also filed motions in limine to preclude the testimony of the plaintiffs' expert, Dr. Steven Markowitz. The court denied the summary judgment of Foster Wheeler

The decedent provided deposition testimony over the course of five days. While on board the *USS Roan*, he worked the valves controlling the amount of water going to the boilers, and also lit and cleaned the burners. The court provided a lengthy summary of decedent's testimony. Pursuant to a naval contract, Foster Wheeler furnished four Babcock and Wilcox boilers for the ship. The plaintiffs argued Foster Wheeler supplied asbestos gaskets, rope, and tape for use in the boiler and the plaintiff's naval expert, Captain Moore, testified that the decedent was exposed to asbestos from replacement gaskets.

Drawings showed that Crane valves were present where the decedent worked, including on the Foster Wheeler boilers. The plaintiff argued that Crane specified the use of asbestos in boiler check valves; Crane argued the drawings relied upon by the plaintiff were made to comply with Navy specifications, not Crane specifications.

The court applied maritime law to the plaintiff's claims. First, Foster Wheeler argued it was entitled to summary judgment pursuant to the government contractor defense, which protects independent contractors from tort liability associated with their performance of government contracts. In this case, for this defense to apply, Foster Wheeler must show that its failure to warn resulted from a discretionary decision by the Navy; Foster Wheeler cannot generally claim the Navy had control over the project. Foster Wheeler's conclusory statements that the Navy required it to provide boilers were insufficient to create a question of fact.

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

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

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

Read the full decision here.

Plaintiffs' Evidence in Response to Two Defendants' Summary Judgment Motions Insufficient to Infer Exposure to Lifetime Boilermaker

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

The plaintiffs filed a wrongful death and survival action in state court; shortly thereafter defendants removed to federal court. The plaintiffs asserted negligence and strict liability claims from the death of their father/husband from malignant mesothelioma; the decedent was a career boilermaker. Defendants Lamons Gasket Company and Parker-Hannifin Corporation moved for summary judgment; both were granted.

The plaintiffs alleged asbestos exposure during the decedent's work on boilers and other equipment installed on naval, industrial, and commercial vessels. Lamons and Parker argued lack of exposure. In response to special interrogatories filed by Lamons, the plaintiffs failed to provide any specific facts regarding when, where, or how the decedent was exposed to asbestos-containing Lamons products. Co-workers identified by the plaintiffs did not provide any testimony regarding Lamons gaskets or other products. The plaintiffs attempted to create a genuine issue of material fact with the testimony of one co-worker, who assumed decedent worked with Lamons gaskets. The court found that "the mere 'possibility' of exposure does not create a triable issue of fact."

The court found the same with respect to Parker; the plaintiffs' discovery responses failed to identify any facts, documents, or witnesses establishing the decedent's exposure to Parker or Sacomo products. While the plaintiffs argued that Sacomo supplied asbestos-containing cloth to contractors working on the same ships as the decedent, close examination of such evidence revealed that decedent may have been exposed. This was insufficient to infer

that the decedent was exposed to Sacomo cloth. The court stated: “This evidence ‘creates a dwindling stream of probabilities that narrow into conjecture.’”

Read the full decision here.

Summary Judgment Granted in Favor of Defendant Company Pursuant to California’s Workers’ Compensation Act in Matter Involving 44 Years of Alleged On-The-Job Asbestos Exposure

(U.S. District Court for the Northern District of California, March 23, 2016)

The plaintiff filed a lawsuit in state court alleging that from 1956 to 1990, he was employed by the defendant and “spent a significant portion of that time ‘dealing with asbestos, fiber glass products and other hazardous products.’” The three causes of action were for: (1) premises liability; (2) negligence; and (3) negligent infliction of emotional distress. The defendant removed the case to the Northern District of California and then moved to dismiss it on the grounds that California’s Workers’ Compensation Act provided the exclusive remedy for work-related injuries. The plaintiff, in response, filed an amended complaint wherein he and his wife alleged seven causes of action, including the three aforementioned causes of action, as well as: (4) products liability/manufacturing defect; (5) products liability/design defect; (6) products liability/failure to warn; and (7) loss of consortium.

The defendant first argued that all of the claims asserted in the amended complaint were barred under the “exclusive remedy provision” of the California Workers’ Compensation Act. Under this argument, since the amended complaint alleged that the defendant was the plaintiff’s employer, that plaintiff was exposed to asbestos products during the course of his employment, and that he developed injuries as a result of said exposure, the pertinent elements of the Act were met. The plaintiff countered the assertion by documenting his efforts to unsuccessfully secure the payment of compensation from any purported insurer of the defendant. He asserted that his failure allowed this case to fall into an area of California labor law which provides that “[i]f any employer fails to secure the payment of compensation, any injured employee or his dependents may bring an action at law against such employer for damages.” In response, the defendant submitted a certificate of consent to self-insure that was issued to it in 1930 and had been in full force and effect ever since and requested that the court take judicial notice of same. The certification would take the compensation issue out of the purview of the pertinent labor laws.

The plaintiff also alleged “bad faith” as a result of the defendant’s failure to respond to inquiries as to the workers’ compensation claim and a claim under California’s “dual capacity doctrine,” which allows labor lawsuits to go forward in “narrow factual circumstances presented where the employee’s injury was caused by the employer’s product, which itself was provided to the employee not by the employer, but by an independent third person who obtained the product from the employer for valuable consideration.”

The court dismissed the plaintiff’s arguments in their entirety. It noted that the certification provided by the defendant did, in fact, leave the claim subject to the “exclusive remedy provision” of the California Workers’ Compensation Act. Further, the court noted the plaintiff had not cited any authority for a “bad faith” exception to the “exclusive remedy provision” and that his allegations in the amended complaint were too “legally conclusory” and “not supported by any factual allegations” to suggest that the “dual capacity doctrine” would be applicable. The court accordingly expressly dismissed the first six causes of action, and did not address the loss of consortium claim, which necessarily had to be dismissed too. However, the court did grant the plaintiff leave to amend the complaint one additional time to assert a claim for fraudulent concealment. Such a claim, if established, is a recognized exception to the “exclusive remedy provision” and provides that “[w]here the employee’s injury is aggravated by the employer’s fraudulent concealment of the existence of the injury and its connection with the employment.”

Read the full decision here.

Lack of Evidence Linking Decedent’s Asbestos Exposure to Defendants Leads to Summary Judgment for Pump and Valve Manufacturers and Contractor

(U.S. District Court for the Northern District of Alabama, Northeastern Division, March 24, 2016)

The plaintiff, George Holland, brought this action on behalf of the decedent, Owen Holland, alleging exposure to asbestos from his work at Monsanto Chemical Plant from 1967–2004. From 1974-2002, the decedent worked with external components of pumps and valves manufactured by Goulds and Crane. He also would sweep packing from around the pumps and fibers from around the valves. Both Goulds and Crane moved for—and were denied—summary judgment. Defendant Fluor Daniel preformed construction and maintenance work at Monsanto from 1967-

1998. Its motion for summary judgment was granted only in part and just the claims prior to May 19, 1980 were dismissed based on the statute of repose. The defendants appealed.

On appeal, all of defendants' motions were granted. Regarding Crane, the court held: "Simply put, George has failed to present any evidence showing that Crane was the manufacturer of any of the packing Owen worked around or that a particular shipment to Monsanto of Crane valves had asbestos in their original packing. As such, there is no evidence before the court linking Crane valves with original asbestos-containing component parts to the valves that Owen worked around. Without this evidence, no reasonable jury could conclude that Owen was exposed to asbestos fibers from a product manufactured, supplied, or otherwise placed into the stream of commerce by Crane. Accordingly, summary judgment in favor of Crane is warranted with respect to this alleged exposure."

Regarding Fluor Daniel, the court noted that the plaintiff relied on the testimony of a Richard May, who was not disclosed until eight months after the close of discovery. As the court held: "Accordingly, Mays' testimony is inadmissible and cannot form the basis to defeat summary judgment. Alternatively, even if Mays' testimony is admissible, it does not create a material dispute because Mays does not mention Owen directly, and he is not even certain if he personally worked with any asbestos insulation. Moreover, Owen's own testimony that he breathed in the dust generated by "Daniel" crews performing insulation work at Monsanto is speculative and conclusory. Accordingly, summary judgment is due in favor of Fluor Daniel." (internal citations omitted).

Regarding Goulds, the court held: "Based on the record before this court, the court finds that George has failed to present evidence that the Goulds pumps supplied to Monsanto were among the Goulds pumps with original asbestos-containing component parts. In fact, Owen testified that although he worked around Goulds pumps, he never worked on the internal parts of a pump, and that it was impossible to determine the manufacturer of the packing material that was removed from any of the pumps. Simply put, because Owen could not identify Goulds as the manufacturer of the packing to which he was exposed to during his employment at Monsanto, and in light of George's failure to present any evidence showing that a particular shipment of Goulds pumps to Monsanto had asbestos in their original packing, Goulds is due summary judgment with respect to this alleged exposure."

Read the full decision here.

Even Applying Relaxed Product Identification Standards of New York Law, Plaintiff Fails to Establish Exposure to Five of Six Defendants Moving for Summary Judgment

(U.S. District Court for the Southern District of New York, March 22, 2016)

The decedent, a lifetime electrician, passed away in 2014 of lung cancer. Prior to passing, he filed a lawsuit for asbestos exposure against numerous manufacturers. Six defendants filed motions for summary judgment arguing lack of exposure — Rockwell Automation (Allen-Bradley); BW/IP International (Byron Jackson); Air & Liquid Systems (Buffalo); Gardner Denver; Schneider Electric (Square D); and Warren Pumps. The court granted all motions, except that of Allen-Bradley.

The decedent claimed exposure to Warren pumps while serving as a civilian employee on board the U.S.S. Constellation. No testimony identified Warren pumps, but the plaintiff produced historical ship records for this ship identifying Warren pumps in the engine room. Regarding Buffalo, Byron Jackson, and Gardner Denver, no testimony identified Buffalo as the manufacturer of pumps on the two ships worked on by the decedent. After the close of discovery, the plaintiff produced one ship record identifying a Byron Jackson pump on board the U.S.S. Constellation, and one ship record identifying Gardner Denver pumps on the U.S.S. Lake Champlain, another ship on which the decedent worked. The decedent identified Square D products during the course of his work as an electrician and further identified Allen-Bradley products.

To establish a claim for liability under New York law, the plaintiff must prove exposure to the defendant's merchandise and that this exposure was more likely than not a substantial factor in his injury. Circumstantial evidence alone may suffice, but the plaintiff must show some circumstantial evidence that he was at the approximate time and place during which the defendants' products were used. Certain defendants also argued that the plaintiff's claims against them arose under maritime law.

Summary judgment was granted as to Warren. Evidence produced by the plaintiff identifying Warren after the close of discovery was not considered by the court because: (1) the plaintiff provided no explanation for the failure to disclose; (2) the evidence was important, yet substantially prejudicial, to Warren, and (3) while a continuance was possible, to reopen discovery after its initial conclusion two years ago constituted an unwarranted delay. Further,

although the plaintiff's claims arose under New York, not maritime, law, this was irrelevant because the plaintiff's claims against Warren failed under both.

Summary judgment was likewise granted to Square D. Although the plaintiff adequately described the Square D products at issue, "Balcerzak was simply unable to connect his exposure to any particular time, place, or employer, repeatedly speaking in terms of what 'could be' and linking it with 'one or all' of his many employers…This inexactitude far exceeds the leeway afforded asbestos plaintiffs under the law." Further, the plaintiff had no co-worker testimony to fill in any gaps.

Allen-Bradley's summary judgment was denied because Allen-Bradley did not argue that the plaintiff fell short of alleging a sufficient connection of its products to any time, place, or employer. The court also analyzed whether genuine issues of material facts were raised with respect to specific Allen-Bradley products.

Summary judgments for Buffalo, Byron Jackson, and Gardner Denver were unopposed and granted.

Read the full decision here.

Summary Judgment Affirmed Where Plaintiff Failed to Produce Sufficient Evidence of Asbestos Exposure

(Court of Appeal of California, First Appellate District, Division Four, March 18, 2016)

In this case, the plaintiff Melvin Desin, an electrician, alleged that he was exposed to asbestos while working at various job sites in the 1960s and early 1970s, including on seven or eight occasions in the vicinity of painters employed by defendant Zelinsky, a painting contractor. At his deposition, the plaintiff testified that he worked in close proximity to the Zelinsky workers, who patched and sanded walls and joint compound in his presence. However, the plaintiff could not identify the brand name, manufacturer, or supplier of any of the materials the Zelinsky workers used. He also could not recall any particular year when he worked around Zelinsky employees, or a specific instance in which the employees sanded walls.

Zelinsky moved for summary judgment on the basis that the plaintiff failed to produce any admissible evidence that he was exposed to asbestos products that it supplied, distributed, handled, or used. In opposition, the plaintiff submitted a declaration stating that when he worked in the vicinity of Zelinsky's employees, dust from joint compound would end up on his clothing, face and hair and on the job site floor. He also submitted an expert declaration by William Ewing, an industrial hygienist, which stated that joint compound products during that time period "nearly universally" contained asbestos and that the joint compound to which the plaintiff was exposed "more likely than not" contained asbestos. The trial court sustained defense objections to both the plaintiff's and Ewing's declarations and granted summary judgment in Zelinsky's favor.

The intermediate appellate court affirmed, noting that the plaintiff's own testimony established that he did not know if he had been exposed to asbestos by working in the vicinity of Zelinsky employees, that he could not identify a particular instance in which he worked around Zelinsky employees, and that he did not know the brand name, supplier, or manufacturer of any materials the workers applied or sanded in his presence. The plaintiff's discovery responses, identifying certain drywall products, did not establish that those products used by Zelinsky in the 1960s and 1970s actually contained asbestos or that the products were used on the seven to eight occasions that the plaintiff worked alongside Zelinsky employees. Further, Ewing's expert opinions lacked a proper foundation and could not "fill the gap" in the plaintiff's evidence. The court held: "[i]n the absence of admissible evidence that Desin was exposed to asbestos-containing products as a result of the activities of Zelinsky employees, we conclude plaintiff failed to carry the burden to show a triable issue of material fact."

Read the full decision here.

Summary Judgment Affirmed as Evidence of Asbestos Impurities in Auto Body Filler Only Equated to a Possibility of Asbestos Exposure

(Court of Appeal of California, First Appellate District, Division Five, March 15, 2016)

In this case, it was alleged that the plaintiff, John DePree, was exposed to asbestos from various products, including the use of Bondo auto body filler in the 1970s to repair dents in his cars. BASF Catalysts, LLC moved for, and was granted, summary judgment based on its argument that the plaintiffs could not offer more than a mere possibility of

exposure to asbestos from a BASF product since any asbestos in the Bondo talc was an impurity and not an intended ingredient. The plaintiffs appealed.

On appeal, the trial court's ruling was affirmed: "In the absence of evidence that all or even most of the talc was contaminated with asbestos, plaintiffs could show only a possibility of asbestos exposure. Under California law, such a possibility is insufficient to support a finding in plaintiffs' favor on the issue of causation. Accordingly, we will affirm the judgment."

Read the full decision here.

Summary Judgment Overturned on Triable Issue as to Medical Monitoring of Plaintiff's Asbestos-Related Pleural Plaques

(Court of Appeals of California, First Appellate District, Division One, March 14, 2016)

In this federal court case, the plaintiff, Robert Hanson, filed a complaint in 2010 against various defendants, including "Doe" defendants, alleging asbestos exposure caused his asbestosis. In 2012, the plaintiff substituted Collins Electrical Company for one of the Doe defendants. In 2013, Collins moved for summary judgment, arguing that the plaintiff did not have any evidence of asbestosis or any asbestos-related injury. While the motion was pending, the plaintiff was allowed to file a first amended complaint, which removed any reference to asbestosis and claimed plaintiff suffered from "asbestos-related pleural disease." The plaintiff then opposed the summary judgment motion, arguing that the evidence submitted by Collins in its motion papers showed he was suffering from asbestos-related pleural disease. Collins responded by arguing that since there was no physical impairment resulting from the asbestos exposure, the plaintiff has not suffered an injury under California law and, as such, has no claim. The trial court subsequently granted Collins' motion for summary judgment.

On appeal, the court discussed the plaintiff amending his complaint while Collins' motion for summary judgment was pending and stated: "Hanson's first amended complaint both changed the nature of his claims (from asbestosis to 'asbestos-related pleural disease') and elaborated on his alleged damages, including for future risk of 'cancer' and 'emotional distress attendant thereto,' and future costs for 'X-rays, and other medical treatment.' Thus, the amended pleading changed the scope of the issues for purposes of summary judgment, and, in fact, Collins complained to the trial court that Hanson's pleural plaque claims were 'new.' Accordingly, Collins' motion for summary judgment should have been denied as moot, and the trial court should have granted Collin's request to 'file a new motion for summary judgment and/or summary adjudication based on the newly alleged facts.'"

However, the court went on to hold that there was no need to remand the case for further proceedings on summary judgment and reversed the lower court's granting of summary judgment. As the court held: "Thus, it could not be more clear that a plaintiff exposed to a toxic substance need not wait until he or she suffers actual 'impairment' before seeking damages for medical monitoring, provided he or she can 'demonstrate, through reliable medical expert testimony, that the need for future monitoring is a reasonably certain consequence of' the exposure 'and that the recommended monitoring is reasonable.' In short, the pivotal 'damage' sustained by such a plaintiff is the 'reasonably certain need for medical monitoring.'" (internal citations omitted).

Read the full decision here.

Federal Court Applies Bare Metals Defense in Finding Boiler Manufacturer Not Liable for Asbestos Supplied by Third Parties

(U.S. District Court for the Western District of Wisconsin, March 10, 2016)

After the plaintiff's husband died from lung cancer, the plaintiff filed a lawsuit alleging strict liability and negligence due to asbestos exposure from his work insulating and maintaining boilers. It was transferred to the Pennsylvania MDL, then remanded back to Wisconsin federal court. Defendant Trane U.S., Inc. then moved for summary judgment, arguing: (1) it did not assume the liabilities of American Standard, and (2) American Standard did not manufacture, distribute or specify the asbestos materials that caused decedent's injuries. The court granted the motion on the second ground; under the "bare metals defense," Trane could not be held liable for injuries caused by products it did not manufacture, distribute, or specify to be used.

First, the plaintiff's strict liability claim failed because the trial judge found that American Standard was not the manufacturer or seller of asbestos materials to which the decedent was exposed. Second, the court looked to Wisconsin law in determining the plaintiff's negligence claim likewise failed. The plaintiff argued that American

Standard's duty of care required it to warn the decedent about harms associated with third parties' asbestos products, because it was foreseeable that contractors and maintenance workers would use such materials on American Standard boilers. However, Wisconsin law has rejected the proposition that a defendant's duty of care is tied to whether the plaintiff's alleged harm was foreseeable. Further, individuals have no obligation to prevent harms that may or will befall others, regardless of the foreseeability of such harms, unless those harms are in some way attributable to the individuals' conduct. "Courts in Wisconsin have recognized consistently that a defendant's duty to warn is generally limited to the risks associated with its products, not the products of third-parties, regardless whether the use of those third-party products is foreseeable."

The court found that: "Here … the asbestos-containing products that harmed plaintiff were neither manufactured nor distributed by American Standard, and their dangerous propensities were not attributable to the fact that they were used in connection with American Standard's boilers. Moreover, there is no evidence that American Standard participated (either actually or constructively through some form of specifications) in integrating the asbestos-containing materials into the boiler. Accordingly, defendant cannot be held liable for failing to warn about the dangers associated with the third-party asbestos-containing products plaintiff handled."

Although the plaintiff pointed to manuals and deposition testimony requiring asbestos insulation, this evidence was inadmissible because the plaintiff offered no foundation. Further, limiting Trane's liability was consistent with Wisconsin public policy considerations; allowing recovery in this case would have "no sensible or just stopping point," and doing so would place too unreasonable a burden upon the tortfeasor.

Read the full decision here.

NYCAL Judge Denies Defendant's Motion for Summary Judgment on Product Identification and Other Grounds

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

In a February 22, 2016 decision, the Honorable Peter H. Moulton, J.S.C. of the Supreme Court of the State of New York, New York County denied the defendant's motion for summary judgment in a case where the plaintiff-decedent was allegedly exposed to asbestos during a lengthy career as a longshoreman on at certain New York City piers. During the pertinent period, the moving defendant was alleged to be the manufacturer of two asbestos-containing products (i.e., a pelletized product and a phenolic molding compound). The plaintiff alleged direct and bystander exposure to the aforementioned products arising from certain bags he allegedly came in contact with, or was in proximity to, in and around the piers during his employment as a longshoreman. The defendant moved for summary judgment, arguing, among other things, that there was a "lack of product identification and [a] lack of any evidence or expert opinion that exposure to [the defendant's] product caused [plaintiff-decedent's] illness and death." Specifically, the defendant pointed out, among other things, that neither the plaintiff-decedent, nor his co-worker, specifically identified the defendant's bags by name at the job sites at issue.

The court, however, determined that the defendant "failed to [meet] its burden to demonstrate that [its products] 'could not have contributed to the causation of [plaintiff-decedent's] injury.'" Here, the court outlined several factors in coming to its determination. It appears that the court relied on an exhibit that purportedly suggested that the defendant was "the only source of [the] pelletized" product at a certain point during the pertinent time period. Further, and while acknowledging that there was no testimony specifically identifying the defendant's product on the bags at issue at the jobsite at issue, the court pointed to evidence that the defendant purportedly shipped similar products to a company in close proximity to one of the piers at issue during the time frame that plaintiff-decedent worked there. These facts, along with other circumstantial evidence outlined by the court, were sufficient in the court's view to deny summary judgment.

Read the full decision here.

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

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

In this decision, there were eight separate actions against Weyerhaeuser Company involving private and public nuisance claims brought by, or on the behalf of, former employees of Weyerhaeuser for asbestos-related injuries based on non-occupational exposure. Weyerhaeuser used asbestos in its mineral core plant to manufacture a door core. The plaintiffs non-occupational exposure claims were based on their living, or being, in close proximity to the plant. Weyerhaeuser "moved to strike plaintiffs' experts and for summary judgment, arguing that plaintiffs are unable

to prove injuries beyond those resulting from asbestos exposure on the job, for which they, their estates and spouses may only recover under worker's compensation laws."

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

Read the full decision here.

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

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

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

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

Read the full decision here.

In Fact-Intensive Unpublished Opinion, California Appeals Court Reverses Grant of Summary Judgment to Three of Four Automotive Defendants

(Court of Appeal of California, February 8, 2016)

In this unpublished opinion, the plaintiffs appealed after the trial court granted summary judgment to defendants Ford, Navistar, Gibbs International, and Kelsey-Hayes. The plaintiffs also filed motions for a new trial as to all four defendants, which the trial court denied. The decedent was a civilian employee at the Naval Construction Battalion Center; while he was not a mechanic, his visited the Construction Equipment Division (CED) where all vehicle repair work was performed. He died of mesothelioma. The appellate court reversed the summary judgments as to Ford, Navistar, and Kelsey-Hayes; it affirmed the judgment as to Gibbs.

The opinion contained an extensive recitation of the facts submitted by all parties. Heavy equipment mechanics testified as to the various repairs performed in the CED, and the brands of equipment. A worker in the purchasing department testified as to the brands of replacement parts. Decedent testified as to the repairs he witnessed. The plaintiffs' evidence showed that the decedent visited CED frequently. Co-workers testified as to equipment from Ford, Navistar (International), and Kelsey-Hayes.

Gibbs acknowledged that it sold some replacement parts to the port for Navistar vehicles. In support of its motion for new trial, plaintiffs submitted the expert declaration of an industrial hygienist, who stated that asbestos fibers remained in the air for quite some time. The plaintiffs also submitted a declaration stating that Gibbs was the port's main source for International replacement parts.

The plaintiffs argued that the defendants' evidentiary showing was insufficient to shift to the plaintiffs the burden to raise triable issues of fact. As to Ford, while it was possible that Ford products were a source of the decedent's asbestos exposure, the record was insufficient to allow such a finding by a preponderance of the evidence. Thus, the court agreed with the trial court that Ford shifted the burden of production to the plaintiffs. In so finding, the court cited various factually similar cases relied upon by the plaintiffs. The court then examined whether the plaintiffs met their burden to produce evidence showing a triable issue of fact as to Ford. The court noted: "In considering whether plaintiffs' showing is sufficient to raise a triable issue, we bear in mind that 'it is not enough to produce just some evidence. The evidence must be of sufficient quality to allow the trier of fact to find the underlying fact in favor of the party opposing the motion for summary judgment.'" Here, among other things, the plaintiffs submitted evidence that at one point up to 150 pieces of equipment were serviced in CED on a daily basis, and that Ford vehicles were in the fleet. This evidence was sufficient to raise a triable issue of fact. The court found the same as to Navistar, and noted: "We recognize that this evidence is not overwhelming. As we have already explained, however, we must view the evidence in the light most favorable to the plaintiff." The court also found the same with respect to Kelsey-Hayes.

However with respect to Gibbs, the court found that the plaintiffs failed to meet their burden.

Read the full decision here.

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

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

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

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

Read the full decision here.

Plaintiff's Failure to List Claims in Bankruptcy Petition Not Enough to Warrant Judicial Estoppel of Such Claims

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

In 2000, the plaintiff brought claims for non-malignant asbestos-related diseases, including ship owners represented by Thompson Hine LLP. In 2004, the plaintiff filed for bankruptcy, without listing his asbestos claims as assets. Three months later the bankruptcy case was closed. In 2007, the plaintiff brought claims for a malignant asbestos-related disease; in 2011 the MDL reinstated asbestos actions, of which this case was a part. The defendant ship owners moved for summary judgment, arguing that (1) the non-malignancy claims were barred by judicial estoppel because the plaintiff failed to disclose them as assets in his bankruptcy filing, and (2) the plaintiff cannot pursue either asbestos claim because both are owned by the bankruptcy estate. The court denied this motion.

The court applied law of the Third Circuit in deciding both issues. In applying judicial estoppel, the test applied in the Third Circuit was: (1) the party to be estopped must have taken two positions that are irreconcilably inconsistent, and (2) estoppel was unwarranted unless the position was changed in bad faith, and (3) the court must not apply estoppel unless it was tailored to address the harm identified, and no lesser sanction would remedy the damage done by the litigant's misconduct. While the plaintiff's two positions were irreconcilably inconsistent, the failure to disclose was not done in bad faith, because the plaintiff could not have known the MDL would reinstate his dismissed asbestos claims.

However, regarding who owned these claims: "these claims are nonetheless part of the bankruptcy estate as they were not only potential claims, but were realized claims technically held in abeyance by the Court, and thus needed to be disclosed. Under these circumstances, the claims remain part of the bankruptcy estate and the trustee remains the real party in interest for such claims, even after the bankruptcy was closed." Even though summary judgment was denied, the court allowed time for the bankruptcy trustee to be substituted as the proper party. Regarding the malignancy claim, which was diagnosed after the plaintiff's bankruptcy, none of the cases cited by the defendants supported the argument that this claim was property of the bankruptcy estate, and summary judgment was denied on this issue as well.

Read the full decision here.

Several Defendants Not Named in Plaintiffs' Interrogatory Answers Move for Summary Judgment With Various Results

(Supreme Court for the State of New York, Eighth Judicial District Asbestos Litigation, February 1, 2016)

In this case, the plaintiff, Mark Denison, claimed exposure to asbestos from numerous products while working at his father's hardware store from 1964-65 to 1969, Dunkirk Radiator from 1972 to 1987, and from his own automotive repair business from 1980 to the early 1990s. Defendants Bird, Inc., Euclid-Hitachi Heavy Equipment, Inc., F.E. Myers, Oshkosh Corporation, and WT/HRC Corporation all moved for summary judgment.

In its ruling, the court highlighted that none of the moving defendants were identified in the plaintiffs' answers to interrogatories. The court went on to state: "The plaintiff's failure to identify defendants' products in their answers to interrogatories shifts the burden to plaintiff to come forward with facts and conditions from which defendants' liability reasonably can be inferred. (see *Gorzka,* supra, *Matter of Eighth Jud. Dist. Asbestos Litig. [Heckel],* 269 AD2d 749 [4th Dept, 2000] ; *Lang v Crane Co., [* Sup Ct, Erie County , March 30, 2015, Chimes, J. Index No. I 2012-202]; *Dickman v Trane U. S. Inc.,* [Sup. Ct, Erie County, September 16, 2010, Lane, J. Index No.2008-12697). However, plaintiffs are not required to show the precise causes of the damages sought, but, only required to show those facts and conditions, from which defendant's liability can be reasonably inferred. *(see Matter of Eighth Jud. Dist. Asbestos Litig. [Reynolds],* 32 AD3d 1268 [2006])."

In its motion, Bird argued that it made both asbestos and non-asbestos-containing roofing felt and the plaintiff testified to using the non-perforated felt, which was non-asbestos-containing. The court relied on the plaintiff's testimony and business records to deny summary judgment. As the court held: "This testimony, along with the business records from Bird revealing that not all Bird's asbestos-containing roofing felts were described as perforated and that little or no visible perforations were on its asbestos-containing felt, raises questions of fact. The motion for summary judgment is therefore denied."

The court granted Myers motion, relying on the affidavit of its chief engineer and over 400 company records that demonstrated that Myers did not make jet pumps for use with wells that had asbestos components as claimed by the plaintiff. In its ruling, the court noted: "In opposition, plaintiffs rely solely on Mr. Denison's deposition and trial

testimony. However, his testimony is nothing more than speculation based on observations of fibers and particles that glittered. Plaintiffs have failed to sufficiently raise a triable issue of fact and defendant Myers' motion is granted."

WT/HRC had two products in the case, a cupola and cranes. It moved on behalf of both defendants and the court granted the motion regarding the cupola and denied the motion regarding the cranes. For the cupola, WT/HRC argued that it was not delivered to Dunkirk until 1975, which postdated the plaintiff's relevant exposure, it did not sell refractory products, and only recommend that non-asbestos refractory product be used with its cupola. As the court held: "Plaintiffs' opposition failed to show facts and conditions from which WT/HRC's liability can be reasonably inferred. Mr. Denison offered nothing more than speculation that he used or was exposed to asbestos while working at the cupola, which is insufficient to sustain plaintiffs' burden. WT/HRC's motion with respect to the cupola is granted." On the cranes, WT/HRC argued that it was not responsible for asbestos-containing replacement brakes or wiring and that while the crane's wiring contained asbestos, the wiring on the cranes plaintiff worked on were not original. The court found the argument on the original wiring to be speculative and disagreed with the argument that WT/HRC was not responsible for replacement parts. As the court held: "This argument however has been clearly rejected in both *Matter of New York City Asbestos Litig. [Konstantin/Dummitt],* 121 AD3d 230 (1″ Dept, 2014) and *Matter of Eighth Jud. Dist. Asbestos Litig. [Sunned,* (Sup Ct, Erie County, March 15, 2013, Lane, J., Index No. 2010-12499) *aff'd for reasons stated below* 118 AD3d 1369 (4′ Dept 2014) *lv granted* 24 NY3d 907 (2014). There is no evidence or basis presented in this case to depart from precedent."

Oshkosh's motion was granted, with the court holding: "It is uncontested that plaintiffs' only evidence of exposure to asbestos from an Oshkosh product, is his deposition testimony. As Oshkosh was not in the case at the time of the plaintiff's deposition, this testimony is inadmissible against Oshkosh. (See CPLR 3117; *Perkins v New York Racing Assn.,* 51 AD2d 585, 586([r^{d} Dept, 1976])."

Euclid-Hitachi's motion was based on its argument that the plaintiff testified to using Euclid brakes and clutches for on-road vehicles and that they only sold replacement brakes for off-road trucks. The court denied the motion stating "that in its answers to interrogatories filed in *Potter v A. W Chesterton,* an Eighth Judicial District case, Euclid-Hitachi admitted selling replacement parts for its heavy equipment (p.3 of Exhibit C of plaintiffs' opposing affirmation) and that prior to 1980, the replacement parts, including clutch facings and brake linings, may have contained asbestos *(id.* at 14). That Euclid-Hitachi sold asbestos-containing brake linings was testified to in 2001 by Clarence E. Eckert, Euclid-Hitachi's corporate representative in *Hilman Stubbefield,* a California case. Mr. Denison testified repeatedly about his use of Euclid's parts and described how his work with these parts caused him to be exposed to asbestos."

Read the full decision here.

Gasket Manufacturers' Motions for Summary Judgment and Motion to Change Venue Denied in Naval Exposure Case

(U.S. District Court for the Southern District of Illinois, January 28, 2016)

In this federal court case, the plaintiff alleged he was exposed to asbestos in various products through the course of his employment in the 1960s and 1970s. He specifically alleged asbestos exposure from working with gaskets manufactured by Excelsior Packing & Gasket Company and Goodyear Tire & Rubber Company while serving in the Navy from 1970 to 1975 aboard the U.S.S. Surfbird and U.S.S. Hector. On both ships, the plaintiff's duties included replacing gaskets on pumps, valves, and boilers. He testified to changing flange gaskets on pumps hundreds of times and identified both Goodyear and Excelsior, who moved for summary judgment.

The court denied both motions. Regarding Goodyear, the court held: "Plaintiff's testimony with respect to Goodyear gaskets establishes more than just minimal contact. For approximately three years, Plaintiff regularly maintained, repaired and installed gaskets. Goodyear admits that it manufactured asbestos-containing gaskets. Although Goodyear contends it ceased manufacturing asbestos-containing gaskets in 1969, records indicate that Goodyear products were aboard naval vessels as late as 1973. The Court finds that there are material factual issues remaining in this case."

Regarding Excelsior, the court held: "Excelsior asserts that there is no testimony or other evidence to create a genuine dispute of fact regarding Plaintiff's exposure to any asbestos-containing products attributable to Excelsior. The Court disagrees. Plaintiff has provided evidence establishing 'frequency, regularity, and proximity' to Excelsior asbestos-containing products. Plaintiff specifically recalled using Excelsior prefabbed and sheet gaskets during his naval service. He described replacing countless number of gaskets on pumps, valves, and boilers. The process of installing gaskets created dust which he inhaled."

In another decision, the court also denied the motion of Ingersoll-Rand Company, which was joined in by defendants BorgWarner and Morse Tec, Inc., to transfer venue to the United States District Court for the District of Alaska pursuant to 28 U.S.C. 1404(a). In its denial the court stated: "Although Defendants argue that convenience and the 'interest of justice' dictate transferring this action to Alaska, other than Defendants' conclusory assertions and suppositions, there has been no showing that any witnesses or evidence are unavailable for trial in this district. Nor do Defendants claim that the reasons for which they now seek transfer have arisen only recently, and were not present from the beginning of the case. The Court finds Defendants' arguments particularly dubious given the length of time this case has been pending and the upcoming February 22, 2016, trial date."

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

Post-Bankruptcy Petition Malignancy Claim Not "Sufficiently Rooted" in Pre-Bankruptcy Past to Constitute Property of the Estate

(U.S. District Court for the Eastern District of Pennsylvania, January 29, 2016)

In a follow-up to cases previously reported on in ACT, the plaintiffs in this case, Administrators of the Estate of Bjorn Dahl, alleged that the decedent, Mr. Dahl, was exposed to asbestos while working aboard various ships. The plaintiffs assert that the decedent developed two asbestos-related illnesses, a non-malignancy injury dating back to 1995 and a malignancy claim arising in 1997, as a result of his exposure to asbestos aboard those ships. In 1995, Mr. Dahl brought claims for non-malignant asbestos-related disease. Mr. Dahl's asbestos claim was dismissed administratively, leaving open the possibility for the action to be pursued at a later, unspecified date. Approximately one year after Mr. Dahl filed his first asbestos action and approximately one month after it was dismissed, Mr. Dahl filed for bankruptcy pursuant to Chapter 7 of the bankruptcy code, without listing his asbestos claims as an asset in the bankruptcy filing. The bankruptcy case was closed four months later. Thereafter, in September of 1997, Mr. Dahl was diagnosed with asbestos-related cancer, giving rise to a claim for a malignant asbestos-related disease. On February 7, 2011, approximately fifteen years after he was discharged from bankruptcy, and approximately sixteen years after Mr. Dahl first filed his asbestos action, the MDL Court reinstated Mr. Dahl's asbestos action, which had been dismissed by Judge Weiner in 1996.

The defendants moved for summary judgment, seeking dismissal of Mr. Dahl's non-malignancy and malignancy claims on following grounds: (1) The plaintiffs' non-malignancy claims are barred by way of judicial estoppel because Mr. Dahl failed to disclose the asbestos action as an asset in his bankruptcy filing, and (2) The plaintiffs cannot pursue any of the asbestos claims in the asbestos action, neither the initial non-malignancy claims nor his post-petition malignancy claims because the entire asbestos action is now owned by the bankruptcy estate. In terms of the non-malignancy claims, the court denied the defendants' motion on judicial estoppel grounds because there was no evidence that the Mr. Dahl changed his position "in bad faith" as required to meet the defendants' burden on the motion because a layman could not foresee that a court would reopen an asbestos case fifteen years after the bankruptcy filing. The court determined, however, that the non-malignancy claims were an asset of the bankruptcy estate and that only the Trustee could pursue that portion of the claim.

The court reached a different result on the defendants' standing argument for the malignancy claim, finding that "none of the cases relied upon by Defendants support the conclusion that Mr. Dahl's malignancy asbestos claims are property of the bankruptcy estate…given the facts of the present case, and the standard set forth by maritime law for determining accrual of an asbestos cause of action (including, specifically, its utilization of the "discovery rule"), Mr. Dahl's malignancy asbestos claims are not 'sufficiently rooted' in his pre-bankruptcy past to constitute property of the bankruptcy estate…Mr. Dahl's malignancy asbestos claims (which did not accrue until after the bankruptcy petition was filed and after Mr. Dahl was discharged from bankruptcy) are, therefore, not property of the bankruptcy trustee (and not subject to pursuit by creditors in the bankruptcy action)."

Read the full decision here.

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

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

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

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

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

Read the full decision here.

District Court Adopts Report and Recommendation of Magistrate in Both Granting and Denying Summary Judgment to Various Defendants

(U.S. District Court for the District of Delaware, January 26, 2016)

The district court reviewed the report and recommendations of the U.S. Magistrate Judge, which recommended granting and denying summary judgment to various defendants. The court applied maritime law in granting summary judgment to Electrolux, ABB, Velan Valve, GE, CBS, Foster Wheeler, and Owens-Illinois, and denying summary judgment to Buffalo, Ingersoll-Rand (denied in part), Aurora, IMO, and Warren (denied in part). The court granted summary judgment on the issue of punitive damages to Ingersoll Rand and Warren, because the plaintiff failed to establish same.

The court analyzed the objections of Buffalo, Aurora Pump, Ingersoll Rand, IMO, and Warren. All these defendants argued the plaintiff did not establish exposure to asbestos from their products. The plaintiff argued genuine issues of material fact existed regarding exposure. Arguments raised before the district court had already been raised with the magistrate. Thus, the court adopted the report and recommendations of the magistrate judge.

Read the full decision here.

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

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

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

listed on the bankruptcy; (2) the claims belonged to the bankruptcy trustee, not the plaintiffs. The court denied defendants' motions for summary judgments.

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

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

Summary Judgment Awarded to Pump Manufacturer for Alleged Exposure to Pump Component Parts Manufactured by Third-Parties

(U.S. District Court for the Southern District of New York, January 21, 2016)

In *Holzworth v. Alfa Laval,* et al. 12-CV-06088 (S.D.N.Y. Jan. 21, 2016), Southern District of New York Judge John Keenan granted defendant Ingersoll-Rand's summary judgment motion arising out of the plaintiff's alleged exposure to asbestos aboard the U.S.S. Sheldrake. The plaintiff's decedent had testified that he was exposed to pumps aboard the ship as a bystander and by cleaning them. He did not specifically describe their pumps' composition, but claimed that he scraped asbestos-containing packing from the jackets. He further testified that many of the pumps had been refurbished, with components being replaced.

Ingersoll-Rand moved for summary judgment. Notwithstanding the fact that the motion was unopposed, the court analyzed whether any questions of fact existed with respect to the plaintiff's product liability claims.

The court first determined that no conflict of law existed between Maritime and New York law and then found that summary judgment was appropriate with respect to the plaintiff's negligence, strict liability, warranty, and warnings claims.

Turning first to the negligence, strict liability, and warranty claims, the court analyzed the plaintiff's complaint and interrogatory answers, but did not identify any specific allegations with respect to claims against Ingersoll-Rand. Next, the court found that the plaintiff did not identify any evidence of exposure to asbestos from a product "produced by Ingersoll." *Id.,* at p. 9. It was insufficient to merely show that the plaintiff was present aboard the ship that contained the defendant's pumps "that were wrapped in asbestos." *Id.,* quoting various cases. As a consequence, the court dismissed the warranty, negligence and design claims.

Turning to whether a duty to warn existed, the Court, citing New York law, evaluated whether the defendant "had any active role, interest , or influence in the types of products to be used in connection with its own product after it placed its product into the stream of commerce." *Id.,* citing *In re N.Y.C. Asbes. Litig.*, 121 A.D.3d 230 (2014).

Here, the court found that there was no duty to warn of a third-party's component parts where: "The Plaintiff has not provided any evidence to suggest that Ingersoll had any role, interest, or influence whatsoever in the products that the Navy used in connection with its pumps, much less that Ingersoll actively participated in, knew of, or manufactured products that necessitated the use of third-party asbestos-containing products. The Decedent's deposition testimony and interrogatory responses state only that Ingersoll manufactured cast-iron pumps. This evidence, standing alone, does not raise a genuine dispute as to whether Ingersoll placed the asbestos-containing components into the stream of commerce played an active role in their use, or manufactured pumps that required such components."

In other words, since there was no evidence showing that "Ingersoll knew of or otherwise influenced the Navy's use of asbestos-containing materials produced by third parties, there is no genuine dispute as to any material fact relating to Ingersoll's lack of a duty to warn" of the dangers of third-party products.

Read the full decision here.

Foreseeability of Injury Nor a Special Relationship Existed to Create a Duty in Secondary Exposure Case

(Supreme Court of North Dakota, January 14, 2016)

The plaintiff contracted mesothelioma and sued various defendants for asbestos exposure allegedly sustained as a child. Kuettel performed industrial and commercial insulation contracting work; the plaintiff's father worked for Kuettel from 1961-65 and again from 1974-79. Kuettel moved for summary judgment, arguing it had no duty to warn the plaintiff because there was no special relationship between it and the plaintiff, and because it did not manufacture any of the asbestos-containing products it supplied and installed. The district court granted the motion because there was no special relationship between the plaintiff and Kuettel. The supreme court affirmed.

The plaintiff argued the court erred in granting the motion because it should have focused on the foreseeability of injury in its analysis of whether Kuettel owed a duty to the plaintiff. In deciding whether a duty was owed to a plaintiff in a secondary exposure case, courts focus on either the foreseeability of injury or the nature of the relationship between the parties. The plaintiff cited numerous cases holding a duty was owed to the plaintiff on the basis of foreseeability, which depended upon the employer's knowledge of the risk that employees could carry asbestos home to cause injury to others. "Here, regardless of whether the focus is on foreseeability of injury, relationship of the parties or a combination of both, Palmer has not raised any genuine issues of material fact that would preclude summary judgment. The evidence submitted by Palmer fails to establish a special relationship between Kuettel and Palmer or Kuettel's knowledge of the dangers of asbestos while Palmer's father was employed by Kuettel."

Read the full decision here.

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

(Superior Court of Pennsylvania, January 12, 2016)

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

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

Read the full decision here.

In Case Where Steamfitter Worked on its Premises, Owner Denied Summary Judgment Based on the Wisconsin Safe Place to Work Statute

(U.S. District Court for the Eastern District of Wisconsin, January 7, 2016)

In yet another follow-up decision in the Ahnert case out of Wisconsin federal court, Pabst Brewing Company moved for summary judgment. As previously reported, Foster Wheeler was granted summary judgment, but insulation contractor, Sprinkmann Sons Corp. was denied summary judgment based on the Wisconsin statute of repose. The decedent was a union Steamfitter from 1955 to 1992 and claimed exposure to asbestos while working on Pabst's premises. In its motion, Pabst argued that there was no evidence that decedent was exposed to asbestos from any products on a premises owned, operated or controlled by Pabst.

The court, in denying the motion, looked to the Wisconsin safe place statute, Wis. Stat. 101.11, which imposes a duty on premises owners to "construct, repair, and maintain premises so as to make them safe for employees or 'frequenters.'" The court then looked to the testimony of the decedent's co-worker, Robert Wolter, who worked at Pabst the same time as decedent and testified to decedent working in the vicinity of pipe insulators installing kaylo pipe covering. The court concluded: "Taking the evidence in the light most favorable to the nonmoving party, as the court must at this stage of the litigation, there is evidence that creates a genuine issue of material fact under the safe place statute. Wolter testified that he worked with Daniel Ahnert at Pabst, and that Pabst employees were on site draining pipes. Further, the work of disconnecting, reconnecting, and reinsulating pipes created 'quite a bit of dust.' On the other hand, Pabst has produced no evidence to support a finding that it relinquished custody or control over the premises to any party during this time frame or that at the time of any relinquishment the premises were otherwise safe. Jack Wetzel, a deliveryman for Sprinkmann, testified that he made deliveries to Pabst between 1955 to 1972 approximately every three weeks and that he delivered asbestos-containing materials, including Eagle 66 cement, and about 75 percent of the materials were high temperature insulation materials."

Read the full decision here.

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

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

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

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

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

Read the full decision here.

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

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

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

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

As the court held: "Loveless testified that he never saw Decedent work with or around any steam traps. Loveless himself only replaced gaskets on a steam trap on two occasions during his service on the Roosevelt. This does not

rise above 'mere exposure' or 'minimal contact' as required under *Lindstrom*. Further, Loveless testified that steam traps were not insulated. In other words, there was no asbestos on the traps." The court went on to state "While all reasonable inferences must be drawn in favor of Plaintiff, Plaintiff cannot create a genuine issue of material fact through mere speculation or the building of inference upon inference. Instead, inferences must be supported by facts in the record. *See* *Lindstrom*, 424 F.3d at 492 ("[A] mere showing that defendant's product was present somewhere at plaintiff's place of work is insufficient [to establish causation]). Here, the record does not contain enough evidence — direct or circumstantial – to create a genuine issue of material fact. Accordingly, summary judgment is granted."

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

Read the full decision here.

Wisconsin Federal Court Applies Statue of Repose in Granting Summary Judgment to Foster Wheeler after Multiple Lawsuits Filed by Same Plaintiff

(U.S. District Court for the Eastern District of Wisconsin, January 5, 2016)

The plaintiff was a steamfitter who filed a lawsuit against Foster Wheeler and others due to asbestosis developed after alleged asbestos exposure. After this case was transferred to MDL 875, the plaintiff was diagnosed with mesothelioma and filed a second suit, again naming Foster Wheeler. After the plaintiff died, his wife dismissed the second lawsuit; three years later she sought to amend the MDL case to include the mesothelioma diagnosis, which the MDL denied due to time. Meanwhile, the plaintiff filed a third lawsuit in this court, naming both asbestosis and mesothelioma. After this case was filed, the MDL transferred the original case back to Wisconsin. Foster Wheeler filed a motion for summary judgment in the original case, which the court granted.

The plaintiff argued exposure to asbestos from a Foster Wheeler boiler present at the Oak Creek Unit 5 power plant and installed by Foster Wheeler in 1958. Enormous quantities of asbestos insulation was used on this unit. A co-worker testified that he worked with the plaintiff on this unit for six months in the 1980s.

Foster Wheeler argued that the Wisconsin Worker's Compensation Act was the plaintiff's exclusive remedy. Although the plaintiff's co-worker stated that Foster Wheeler was his employer, the plaintiff argued that Babcock & Wilcox was the decedent's employer at the time of exposure. Instead, the court applied the Wisconsin statue of repose in holding that the plaintiff's claims were barred because she had ten years from the date of installation to bring suit, and the boiler was a continuous improvement to real property.

The court stated: "The Wisconsin Supreme Court has explained that the statue of repose protects '*all* who are involved in the actual improvement of real property *to the extent they participated in improving the property*.'… On the other hand, the statute excludes material producers from protection when liability is based on the defective design or manufacture, which occurs prior to any involvement with the improvement… The statute protects those companies like Foster Wheeler who provided the specifications for the installation and actually installed the new equipment. Because Foster Wheeler was not the manufacturer or producer of any asbestos products, the statute applies."

It is noteworthy that at the outset of its opinion, the court discussed the fact that much of plaintiff's evidence surfaced for the first time through its opposition to Foster Wheeler's motion. In an attempt to create a genuine issue of material fact, the plaintiff filed a declaration contradicting the same witness's prior deposition testimony, which the court excluded as a sham. The plaintiff also produced "new" social security records that were never previously produced. The plaintiff conceded at oral argument that she knew of documents contradicting the dates of alleged exposure.

Read the full decision here.

Court Lacks Specific Jurisdiction Where Complaint is Devoid of Allegations that Injury Arose Out of Defendants' Contacts with State

(U.S. District Court for the Southern District of Illinois, January 6, 2016)

The plaintiffs' complaint alleged that John Clark was exposed to asbestos from the defendants' products while serving in the U.S. Air Force and during his employment at McDonald Douglas and Boeing. Multiple defendants made motions to dismiss, arguing that the District Court lacked jurisdiction over them. The plaintiffs failed to file timely responses to any of the motions and the court used it is discretion to construe the plaintiffs' failure to do so as an admission of the merits of the motion. In granting the motions, the court noted that the plaintiffs' complaint was devoid of allegations that the plaintiffs' alleged injuries arose out of or relate to the defendants' contacts with Illinois. As such, this court lacked specific personal jurisdiction over the claims against the defendants and the action was dismissed.

all four factors favored the application of Kansas law and pointed out that the focal point of the parties' relationship was the most important factor on the issue of liability in an asbestos-exposure case. As the court held: "Applying this reasoning here, it is clear that the relationship between Hennessy and Plaintiffs was centered in Kansas. Mr. New only came in contact with Ammco's products through his employment with various Kansas-based automotive part and mechanic shops. This particularly weighty contact tips the scales heavily in favor of applying Kansas law."

After determining that Kansas law applied, the court ruled that the plaintiff failed to satisfy the *prima facie* elements of the Kansas Silica and Asbestos Claims Act (KSACA). Under the KSACA, the court said: "…the plaintiff must show that he received 'a diagnosis by a competent medical authority that [his] asbestos-related cancer was proximately caused by asbestos exposure.' Kan. Stat. Ann. § 60-4902(c)(3). An individual qualifies as a 'competent medical authority' if, among other things, he 'has or had a doctor-patient relationship with the exposed person, or in the case of a board-certified pathologist, has examined tissue samples or pathological slides of the exposed person at the request of the treating physician….'Id. § 60-4901(o)(2). The plaintiff must prove these requirements by submitting a written report with supporting test results within sixty days of filing suit. Id. § 60-4903(a). If the plaintiff fails to make this showing, then the Court must dismiss the case without prejudice. Id. § 60-4903(c)." The court dismissed the case against Hennessy, finding no evidence that the plaintiff's expert pathologist, Dr. James Strauchen, had any kind of doctor-patient relationship with Mr. New.

Defendant Caterpillar, however, fared differently. The court denied its motion to apply Kansas law, holding that "Missouri boasts the most significant relationship to Plaintiffs' claims against Caterpillar." The court gave Caterpillar additional time to submit a supplemental brief on the choice of law argument and went on to withhold a ruling on Caterpillar's causation arguments until after the Daubert challenge to Dr. Strauchen is resolved.

Read the first decision here.

Read the second decision here.

Verdict Reduction Decisions

Pennsylvania Federal Court Denies Defendant's Motion to Mold Verdict and Grants Plaintiff's Motion to Apply Delay Damages to Compensatory Damages

(U.S. District Court for the Eastern District of Pennsylvania, June 15, 2016)

The plaintiff-decedent, Valent Rabovsky, and his wife Ann Rabovsky filed suit in the Philadelphia County Court of Common Pleas, claiming that the plaintiff-decedent, who had worked as a millwright in the 1950s, developed malignant mesothelioma from work-related exposure to asbestos and asbestos containing products, which were produced, manufactured, and/or distributed by various defendants (Case was removed to Federal Court three months later).

On February 2, 2016, a jury trial was held on the issue of whether defendant Crane Co. was negligent in failing to warn the plaintiffs of the danger of exposure to asbestos. The jury found in favor of the plaintiffs and awarded $1,085,000 in damages, consisting of $835,000 in compensatory damages and $250,000 for Ann Rabovsky for loss of consortium. The jury apportioned liability against defendant Crane Co. and the settling defendants as follows:

Joint Tortfeasor Defendant	Apportioned Liability
Crane Co.	30%

CBS Corporation	25%
Foster Wheeler Energy Corp.	20%
Goulds Pumps, Inc.	13%
Doe Run Resources Corp.	5%
Duquesne Light Company	5%
Honeywell International	2%
AK Steel Corporation	0%
Beazer East, Inc.	0%
IMO Industries Inc.	0%
Ingersoll-Rand	0%
Pennsylvania Electric Company	0%
United States Steel Corporation	0%
TOTAL	100%

After the trial, both Crane and the plaintiffs filed post-trial motions to mold the verdict and/or delay damages. Crane Co. filed a motion to mold the verdict and award, contending that the plaintiffs have already been made whole through compensation with the settling defendants prior to trial, and by present/future claims filed with asbestos bankruptcy trusts. Therefore, the defendant argues, the plaintiffs are not entitled to further monetary award since the doctrine of joint and several liability does not support the plaintiff's recovery of more than one satisfaction for one injury. Additionally, Crane argues that, the proposition that a non-settling tort-feasor remains liable for his full proportionate share of the damage award regardless of the amount paid by a settling defendant, is inapplicable because the plaintiffs suffered no shortfall.

The plaintiffs filed a motion to mold the verdict and for delay damages, requesting that final judgment against Crane Co. be entered and the total verdict amount of $1,085,000 be molded to $325,500 to reflect the 30 percent amount of liability apportioned Crane Co. and to that amount, apply delay damages. In support of these requests, the plaintiffs argue that: (1) The defendant Crane Co. is jointly and severally liable for the plaintiffs' damages; (2) Crane Co. is entitled to a set-off for any settlement amount agreed to with a settling defendant who the jury found was a joint tortfeasor; and (3) the verdict against Crane Co. cannot be less than the 30 percent share of liability apportioned to Crane Co. The plaintiffs further contend that there is no justification for any credit that would lower the judgment against Crane Co. below the jury's verdict for Crane Co.'s apportioned liability which was amounted to $325,500.

In its decision to mold the verdict, the court noted a verdict is reduced only by the allocated proportionate share of the settling tortfeasor. In other words, the non-settling tortfeasor may not enjoy a set-off which would reduce or lower its out-of-pocket expense below its own allocated share of the liability. The fact that the plaintiff may receive a larger amount in damages than that determined by the jury does not militate against such an approach. This practice of holding the non-settling tortfeasor liable for his full proportionate share advances the policy in favor of settlement. In the current matter, the Court emphasized that Crane Co. failed to offer any information or evidence to support this claim and merely speculated that the total consideration paid by the settling defendants plus the amount received as a result compensation received or to be received from asbestos bankruptcy trusts exceeds the jury's verdict of $1,085,000. Therefore, because the jury, after weighing the evidence, allocated liability amongst seven defendants whom it determined to be joint tortfeasors, Crane Co. is only entitled to a reduction of the total jury verdict based on the determination of Crane's liability. In other words, the court denied Crane Co.'s motion and held Crane Co. is liable for its full 30 percent share of the verdict.

In its review of the plaintiffs motion for delay damages, the court outlined the Pennsylvania Rule of Civil Procedure provides for delay damages for bodily injury, death or property damages only, and (1) shall be awarded for the period of time from a date one year after the date original process was first served in the action up to the date of the award, verdict or decision, and (2) shall be calculated at the rate equal to the prime rate as listed in the first edition of the *Wall Street Journal* published for each calendar year for which the damages are awarded, plus one percent, not compounded. Therefore, the court used this formula to apply delay damages pursuant to the compensatory damages only. The loss of consortium damages of $250,000 were not considered in this calculation. Delay damages were applied for the years 2011 through 2016 using the following calculation: $250,000 (30 percent of $835,000 Compensatory Damages) X (Interest Rate) X (Numbers of days delay damages rewardable). After totaling each year, the plaintiffs were entitled to $51,596.73 in delay damages. This amount, added to Crane Co.'s 30 percent apportioned liability amount of $325,500, results in a total molded verdict against Crane Co. in the amount of $377,096.73

Read the full decision here.

New York Judge Vacates Award of Past and Future Pain and Suffering to Plaintiff Against Brake Grinder Manufacturer and Orders New Trial on Damages Unless Plaintiff Stipulates to Reduced Awards

(Supreme Court, New York County, April 25, 2016)

The plaintiff, Walter Miller, filed suit against a number of defendants alleging that his mesothelioma was caused by exposure to asbestos through his use of a brake grinding machine manufactured by Ammco. At trial, the jury rendered a verdict in favor of the plaintiff and against the sole defendant remaining at trial, Hennessy Industries, Inc. (Ammco), in the amount of $25 million, consisting of $10 million for past pain and suffering and $15 million for future pain and suffering. A summary of that verdict can be found here. Ammco filed post-trial motions seeking entry of judgment notwithstanding the verdict, a new trial, or in the alternative, remittitur of damages.

Ammco made a number of arguments as to why the verdict should be set aside, arguing that: 1) it did not owe the plaintiff a legal duty to warn about the dangers of asbestos in automobile brakes, which was a product that it did not

manufacture; 2) the evidence offered at trial was insufficient to establish general or specific causation under New York law; 3) an improper comment by the plaintiff's counsel during opening statement warranted a mistrial; 4) it was entitled to a directed verdict on the plaintiff's claim that it acted in reckless disregard of the safety of others and the court's instruction on recklessness did not comport with the law; 5) the jury's allocation of fault was against the weight of the evidence; and 6) the evidence offered at trial was insufficient to support the jury's finding that the plaintiff used an Ammco grinder and that Ammco failed to exercise reasonable care by marketing its grinders without an adequate warning. In the alternative it argued that it was entitled to a new trial or remittitur because the jury's award of damages was excessive. The court rejected all of these arguments except as to the amount of the award of damages. Of note, the court rejected the argument that there is no duty to warn as a matter of law and said that was an issue for appeal and rejected the argument that there was sufficient evidence to support general and specific causation.

As to the jury's award of damages, the court agreed that the award of damages to the plaintiff of $10 million for past pain and suffering and $15 million for one year of future pain and suffering was excessive. The court applied the standard of whether the award deviates materially from what would be reasonable compensation by comparing the instant case with analogous cases with awards that have previously been upheld. The court determined that "based on all the circumstances of the plaintiff's injuries, the award of $10 million for past pain and suffering and $15 million for one year of future pain and suffering deviates materially from what would be reasonable compensation." The court ordered the award for past and future pain and suffering vacated and a new trial was ordered on the issue of damages for past and future pain and suffering unless the plaintiff stipulates to reduce the award of damages for past pain and suffering to $5 million and future pain and suffering to $4 million.

Read the full decision here.