GOLDBERG SEGALLA

# Asbestos Case Tracker

## 2018 MID-YEAR COMPENDIUM

**www.goldbergsegalla.com**

New York | Illinois | California | Florida | Maryland | Missouri | North Carolina
Pennsylvania | New Jersey | Connecticut | United Kingdom

# Asbestos Case Tracker

## Compendium

*Mid-year 2018*

## Hundreds of cases.
## One handy reference.

With reported asbestos decisions continuing to rise, the need to keep informed on developments across the country is imperative.

Goldberg Segalla's *Asbestos Case Tracker* blog — ranked on the *ABA Journal* Blog 100 list of the best legal blogs — is the go-to resource for up-to-date asbestos decisions happening in courts throughout the United States. Our blog also reports on legislative updates, significant verdicts, and other critical developments in the asbestos area. We provide summaries of and access to decisions, along with insightful commentary from our attorney bloggers and guest authors, in-depth feature articles, links to useful resources, and much more.

We are pleased to provide this compendium of *Asbestos Case Tracker* posts to clients and friends of Goldberg Segalla. Our hope is it acts as a convenient resource for you.

Stay up to date on the ever-evolving realm of asbestos litigation — and search or browse by scientific, geographic, procedural law, and substantive law categories — at AsbestosCaseTracker.com.

## Asbestos Defense Team

Goldberg Segalla's asbestos team has decades of experience in this complex and ever-evolving area of law. We serve as national coordinating, trial, and local counsel for clients in a broad spectrum of industries that have been joined in asbestos litigation — including retailers, rail operators, utility providers, contractors, commercial roofers, distributors, and manufacturers of insulation, appliances, industrial equipment, chemicals, and many other products.

Our team has litigated thousands of cases over the last 30 years with success in critical jurisdictions — including several of the toughest venues, dubbed "Judicial Hellholes" — spanning New York and NYCAL, Missouri, Illinois, Maryland, North Carolina, South Carolina, Florida, Pennsylvania, New Jersey, and Connecticut.

Joseph J. Welter
*Toxic Tort and Environmental Practice Groups Chair*
Direct — 716.566.5457
Fax — 716.566.5401
jwelter@goldbergsegalla.com

Joseph Cagnoli Jr.
*Toxic Tort Practice Group Vice Chair*
Direct — 267.519.6865
Fax — 267.519.6801
jcagnoli@goldbergsegalla.com

# Table of Contents

# Bankruptcy Decisions

## Limited Access to Exhibits Filed in Asbestos-Related Bankruptcy Cases was Proper Under Bankruptcy Code Section 107

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

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

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

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

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

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

Read the full decision here.

# Bare Metal/Component Parts Decisions

## Supreme Court Accepts Review of Bare-Metal Defense Under Maritime Law

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

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

## Motion for Reconsideration Based Upon Change in Law Denied as Untimely

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

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

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

Read the full decision here.

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

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

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

On remand, the District Court denied Foster Wheeler's remaining arguments related to product identification/causation and bare metal defense. In its discussion the court highlighted that maritime law applies and to "establish causation under maritime law, Plaintiffs must show that (1) Hilt was exposed to asbestos-containing material manufactured or supplied by Foster Wheeler, and (2) such exposure was a substantial contributing factor in causing his injury." Foster Wheeler argued that there was "(1) a lack of evidence that Hilt had been exposed to asbestos from a Foster Wheeler product, and (2) a lack of evidence that Foster Wheeler manufactured, sold, or supplied the actual asbestos-containing materials to which Hilt was exposed." However, the court denied the product identification/causation portion of the motion agreeing with the Eastern District of Pennsylvania Court's prior finding

that there was evidence that Mr. Hilt was exposed to asbestos from insulation used with Foster Wheeler boilers while aboard Navy ships. The court also denied the bare metal argument stating “Plaintiffs have proffered a declaration from Charles Ay, who concluded that it was ‘more likely than not that [Hilt] was exposed to and inhaled respirable asbestos fibers in concentrations orders of magnitude above background or ambient levels from asbestos-containing refractory original to the Foster boilers.”

Read the full decision here.

# Damage Decisions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Read the full decision here.

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

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

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

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

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

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

Read the full decision here.

## Case Remanded to Determine Setoff Amounts from Settlements with Asbestos Trusts

*(Supreme Court of Mississippi, February 15, 2018)*

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

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

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

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

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

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

Read the full decision here.

# Expert Challenges Decisions

## Talc Defendant Strikes Plaintiff's Expert and Avoids Spoliation Sanctions

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

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

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

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

Read the full decision here.

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

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

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

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

While the Federal Rules of Civil Procedure did not expressly recognize a motion to reconsider, the court discussed various other federal rules and case law in seeking authority allowing for this motion. Specifically, Rule 54(b) allowed a court to review non-final orders, but as noted by several courts, motions to reconsider "'are viewed with disfavor…'". Motions to reconsider may address newly discovered evidence. However, the plaintiffs did not argue that any of the 37 exhibits attached to their motion or any of the three exhibits filed as supplemental authority constituted newly discovered evidence. "Rather, after over eight years of litigation and a scant four months before trial, the plaintiffs

have filed a bevy of exhibits that are newly *created* or newly produced, but decidedly are not newly *discovered*." The court summarized the lengthy steps taken in litigation. In filing these documents after the hearing, "…the plaintiffs have followed a disturbing pattern that has emerged over the course of the litigation in the consolidated cases—a practice of filing, amending or supplementing pleadings or documents after deadlines have expired, one that has contributed to the procedural quagmire of this litigation."

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

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

Read the full decision here.

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

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

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

The court cited prior New York law in noting that a plaintiff must use a causation expert to establish that the plaintiff was exposed to sufficient levels of asbestos from the products in question to have caused her disease. The court first determined that the defendants met their burden of demonstrating that their respective products could not have contributed to the causation of the plaintiff's peritoneal mesothelioma through the affidavits of certified industrial hygienists Mark F. Durham and John W. Spencer, and pulmonologists Allan Feingold and James D. Crapo. Both industrial hygienists opined that the low levels of airborne asbestos that could possibly have emitted from the defendants' products would have had a negligible contribution to a lifetime exposure of asbestos. Both medical experts opined that chrysotile asbestos was not a cause of peritoneal mesothelioma.

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

Read the full decision here.

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

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

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

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

Read the full decision here.

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

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

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

In its decision, the court outlined the proffered testimony of Dr. Brody and stated that his testimony would have minimal value to the case. The court then went on to state that "the similarity between Dr. Brodkin's testimony and Dr. Brody's proffered testimony goes beyond mere overlap and instead, crosses into the unnecessarily cumulative. Both offer insight on the body's natural defenses against fiber inhalation and what occurs when those natural defenses fail. Both instruct on the consequences of asbestos fibers that are deposited along the respiratory tract, including the resulting scarring on the lungs and pleura. Both detail the damage asbestos fibers can have on cell division, resulting in errors in cell growth and ultimately, the development of lung cancer and mesothelioma. Finally, both remark on the dose-responsive nature of the disease and its lack of cure. The degree of similarity between the two expert testimonies is illustrated succinctly by the fact that the two experts' respective PowerPoint presentations feature some identical slides. This danger of presenting needlessly cumulative evidence substantially outweighs the minimal probative value of Dr. Brody's testimony." (internal citations omitted)

Read the full decision here.

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

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

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

The parties agreed that maritime law applied. The court upheld the expert witness preclusion "because it found that under Federal Rule of Evidence 403, the probative value of the testimony is substantially outweighed by a danger of unfair prejudice, confusing the issues, and misleading the jury." The court further stated that "Bedrossian's opinions on specific causation essentially amount to the 'every exposure' theory that Lindstrom rejected—a position that has been affirmed in subsequent decisions applying maritime law." The court then granted Crane's motion to renew its motion for summary judgment stating that because the plaintiff "has failed to put forth sufficiently specific evidence of substantial exposure, the court finds that he has failed to establish that Crane's product was a substantial factor in

causing the injury he suffered. Having failed the substantial factor test, and having no expert testimony on specific causation, Chesher has not established a prima facie case under maritime law for a products liability mesothelioma action."

Read the full decision here.

## Case Remanded After Appeals Court Finds Plaintiff's Expert Unreliable

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

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

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

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

Read the full decision here.

## Plaintiffs' Experts Permitted to Testify Regarding Conspiracy Claims

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

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

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

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

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

Read the full decision here.

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

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

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

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

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

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

Read the full decision here.

## Other Expert Challenges Decisions

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

# Federal Officer Jurisdictional Decisions

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

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

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

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

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

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

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

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

Read the full decision here.

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

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

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

plaintiff's decedent alleged exposure to asbestos in Maine only, was a resident of Maine for the entirety of his alleged exposure, and was diagnosed in Maine.

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

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

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

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

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

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

Read the full decision here.

## Cases Remanded After Court Determines Defendant Shipbuilder Controlled Safety Procedures

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

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

In remanding, the court focused on evidence that the federal government had no control over Avondale's application of safety measures, despite the fact that the government did specify Avondale's use of asbestos in building the ships. The court cited testimony from two Avondale supervisors and a federal ship inspector, who all echoed the notion that the U.S.government played no role in enforcing safety regulations during ship construction, or in ensuring Avondale's compliance with state law obligation to warn of hazards. Stated another way, the plaintiffs' failure to warn and failure to safeguard claims have nothing to do with federal requirements, because safety measures were always controlled by Avondale. In interpreting the federal officer removal statute, 28 U.S.C. Section 1442, and subsequent case law, the court emphasized that removing parties must establish the "requisite causal connection between {their} actions under color of federal office and the plaintiff's claims." Finding a lack of a causal nexus in these two cases, both were remanded.

Read the full decision here.

# Maritime/Admiralty Law Decisions

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

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

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

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

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

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

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

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

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

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

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

Read the full decision here.

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

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

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

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

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

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

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

Read the full decision here.

## Other Maritime/Admiralty Law Decisions

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

# Motions in Limine Decisions

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

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

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

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

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

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

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

Read the full decision here.

# Other Motions in Limine Decisions

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

# Pleadings Challenge Decisions

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

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

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

The court was not persuaded by this argument as both *Jaeger* and *Northstar* were cases already pending in the District Court whereas the instant state court action was ultimately dismissed with prejudice on grounds of forum non conveniens. The plaintiff then filed his complaint in federal court. Therefore, AII's motion was not untimely. As for punitive damages, AII argued that the plaintiff failed to state a claim under North Carolina law. The court reminded that punitive damages under North Carolina law may be found if there are "compensatory damages and an aggravating factor of fraud, malice, or willful and wanton conduct" in conjunction with the injury. AII also took the position that whether it was grossly negligent was irrelevant in the analysis. The court acknowledged that gross negligence and willful and wanton conduct were used interchangeably at times to describe a place between negligence and intentional conduct. Relying on the recent *Justice* matter, the court pointed out that the "distinction between gross negligence and willful and wanton conduct is that gross negligence is done with a disregard for the rights and safety of others whereas an act that is willful is done with "set purpose." Specifically, "gross negligence only requires the willful act, and not necessarily the willful injury. Therefore, a willful or wanton act rises above an act of gross negligence. Accordingly, the question before the court was whether the plaintiff "plausibly pled" that AII "consciously and intentionally disregarded the rights and safety of others." After going through the complaint line by line, the court concluded that the complaint illustrated not only allegations sufficient to survive the motion but also how AII allegedly ignored advice regarding the hazards of asbestos. The court denied AII's motion to dismiss as to punitive damages.

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

Read the full decision here.

## Lack of Personal Jurisdiction Over Defendant Leads to Remand and Dismissal

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

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

On appeal, the plaintiff contended that the court had personal jurisdiction over GE because of the "large amount" of business undertaken by GE in Illinois. GE countered and stated that the amount of business it conducts in Illinois pales in comparison to its overall business footprint. Relying on the principle set forth in Aspen, the court found that

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

Read the full decision here.

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

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

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

The court denied Weyerhauser’s motion to dismiss based on exclusivity of the WCA. Weyerhauser argued that the plaintiffs’ exposure to asbestos still arose out of their employment, and that prior authority supported the bar of these types of community claims. The court was unpersuaded, finding that prior decisions both within and outside the jurisdiction were not binding and inapplicable. The court expressed skepticism that plaintiffs could “prove {a} causal link, or that a reasonable jury could allocate separate damages to that community exposure,” but concluded that community claims were permissible under the WCA.

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

Read the full decision here.

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

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

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

Weyerhauser sought dismissal on two separate grounds. First, the defendant argued the plaintiffs did not allege Mr. Kappel’s exposure from work at Weyerhauser in an effort to circumvent the exclusivity rules in the local worker’s compensation statute. The court disagreed as the complaint alleged exposure from “community or environmental” exposure only. Relying on its previous decisions in the *Kilty/Spatz* cases, the court noted the plaintiffs were not

required to allege exposure from employment. Moreover, Mr. Kappel did not work at Weyerhauser during the time of the alleged environmental exposure according to the court. Finally, the defendant took the position that dismissal was appropriate since the plaintiff had not alleged a specific disease or date of diagnosis. The court was not persuaded by this argument as the plaintiff's amended complaint corrected those two issues. The court granted dismissal of the nuisance claims. However, the motion to dismiss as to negligence was ultimately denied.

Read the full decision here.

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

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

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

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

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

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

Read the full decision here.

# Remand/Removal Decisions

## Removal Under Federal Enclave Jurisdiction Deemed Timely

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

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

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

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

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

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

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

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

The motion for joinder was denied.

Read the full case decision here.

## Concrete Factual Information Starts the 30-Day Removal Clock

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

In September 2016, the plaintiff was diagnosed with mesothelioma, and in September 2017, he filed suit against a defendant, and a number of other parties, alleging his illness was caused by exposure to asbestos. The plaintiff

claimed that his exposure occurred between 1970 and 2004 while he was serving in the U.S.Air Force, working as a commercial airline mechanic, and/or engaging in home remodeling and other activities.

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

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

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

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

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

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

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

The court noted certain disclaimers were valid disclaimers of Federal Officer Removal. Relying on the *Doughtery* decision, disclaimers that disclaimed "claims of a specific nature" were valid where their purpose was not to evade federal jurisdiction. For the instant disclaimer, the court found it to be "circular" and without completeness as to all exposure alleged on Navy jobsites. Further, it did not waive claims for exposure that may have taken place on federal premises. Therefore, the disclaimer was not sufficient.

Th plaintiff then argued that Crane failed to establish the elements required for Federal Officer Removal. Specifically, the plaintiff claimed that Crane's affidavits and exhibits did not establish its government contractor defense. However, the court quickly brushed this aside as the standard only required Crane to present a "colorable" defense rather than a necessarily prevailing one. The next element, whether Crane fit the statutory definition of a person, was not

challenged by the plaintiff. The court also found that Crane acted under the instructions of the U.S. Navy. The causal connection requirement was also satisfied as the plaintiff claimed her husband was exposed to Crane products whereas Crane claimed the U.S. Navy required it to use those products. Lastly, the court honed in again on the issue as to the "colorable" claim. It did not need to determine whether Crane would prevail but rather whether it had jurisdiction under a colorable defense. Here, the court found the elements were satisfactorily established by Crane to assert the Federal Officer Removal statute. Remand was therefore denied.

Read the full case decision here.

## Talc Case Remanded as Defendant Fails to Establish Improper Joinder

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

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

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

Read the full decision here.

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

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

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

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

Read the full decision here.

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

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

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

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

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

Read the full decision here.

## Case Remanded Based Upon Lack of Fraudulent Joinder

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

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

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

Read the full decision here.

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

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

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

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

Avondale appealed the remand. Under the statute, an action "against or directed to…any officer of the U.S.or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such office" may be removed to federal court. To remove, a defendant must show "(1) that it is a person within the meaning of the statute, (2) that it has a colorable federal defense, (3) that it acted pursuant to a federal officer's directions, and (4) that a casual nexus exists between its actions under color of federal office and the plaintiff's claims." The district court held that Avondale could not meet the casual nexus prong and therefore did not examine the other elements of the statute.

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

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

Read the full decision here.

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

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

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

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

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

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

Read the full decision here.

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

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

Four plaintiffs originally filed suit in the Eighth Judicial District of Cascade County Montana alleging exposure to asbestos in Libby, Montana. Defendant BNSF removed the case to federal court on diversity of citizenship grounds, and alleged that BNSF's managing agent John Swing was fraudulently joined. The court reviewed the Magistrate Judge's Findings and Recommendations following a November 2017 hearing, and remanded all four cases to state court.

Each of the four plaintiffs named 80-year-old Montana resident John Swing in their complaints, and gave a two sentence description of his role with BNSF. Swing allegedly acted as a supervisory agent for BNSF in Libby Montana

from 1973 to 1984, with safety concerns falling in his purview. The allegations of the complaints were the same as to Swing and BNSF: that they failed to inquire, study and evaluate the dust hazard to human health, that they failed to take measures to prevent toxic dust from collecting upon and escaping BNSF's property, and that they negligently failed to warn the plaintiffs of the true nature of the hazardous effects of the dust.

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

Read the *Braaten* decision here.

Read the *Flores* decision here.

Read the *Woller* decision here.

Read the *Johns* decision here.

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

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

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

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

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

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

Read the full decision here.

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

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

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

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

Read the full decision here.

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

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

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

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

Read the full decision here.

## Other Remand/Removal Decisions

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

# Statute of Limitations Decisions

## Louisiana Statute of Limitations Bars Wrongful Death Claim Filed in Delaware

*(Superior Court of Delaware, March 26, 2018)*

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

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

Read the full decision here.

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

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

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

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

American Optical filed a Rule 12(b)(6) motion to dismiss the plaintiffs' claims on the basis that (1) the settlement agreement plainly barred their claims, (2) the plaintiffs' claim that the Settlement agreement is relatively null was time-barred because more than five years have passed since it was executed, and (3) even if the plaintiffs could challenge the settlement agreement, the plaintiffs' complaint failed to allege sufficient facts to set forth any plausible claim of relative nullity. The district could hold that the plaintiffs' claim that the settlement agreement is relatively null is barred by Louisiana's five-year prescription period for such claims. Even if the claim was not barred, the court alternatively held that the plaintiffs' consent to the settlement agreement was not vitiated by error, fraud, or duress. The district court dismissed the plaintiffs' claims with prejudice; The plaintiffs' timely appealed.

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

The plaintiffs allege three reasons why they failed to discover their nullity cause of action due to fraud and misrepresentation: (1) Raymond Sr.'s attorney falsely advised the plaintiffs that they were required to sign the released solely to assist Raymond, Sr. with receiving a settlement and the plaintiffs' relied on that advice; (2) American Optical misrepresented in the release that Raymond Sr.'s attorney was acting as the plaintiffs' attorney;

and (3) Raymond Sr.'s lawyer remained silent regarding his ethical duty to disclose his conflict of interest and advise the plaintiffs that they ought to retain their own counsel.

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

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

Read the full decision here

# Statute of Repose Decisions

### Vexing Statute of Repose Question Sent to Massachusetts Supreme Judicial Court

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

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

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

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

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

The District Court held that the case should be certified to the Massachusetts Supreme Judicial Court to determine the following: "whether or not the Massachusetts statute of repose can be applied to bar personal injury claims arising from diseases with extended latency periods, such as those associated with asbestos exposure, where the defendants had knowing control of the instrumentality of injury at the time of exposure."

Read the full decision here.

### Maryland's Court of Appeals Rules on Applicability of Statute of Repose

*(Court of Appeals of Maryland, April 24, 2018)*

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

Read the full decision here.

# Other Statue and Repose Decisions

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

# Summary Judgement Decisions

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

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

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

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

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

Read the full case decision here.

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

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

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

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

The Appellate Court determined that the factual finding of Pecora being the "exclusive supplier" was not supported by the record. The Appellate Court held that the sole possible link between Condon and Pecora was Burnham boilers, and the plaintiff's proofs did not establish that (1) the Burnham boilers were shipped with trim kits, and (2) those trim

kits included wet cement rather than dry cement (Pecora did not manufacture dry cement). The decedent, during his deposition, could not specifically recall whether Burnham boilers came with trim kits. Furthermore, there was no evidence that even if the Burnham boilers came with trim kits, that the kits contained wet cement rather than dry cement.

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

Read the full case decision here.

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

*(Delaware Superior Court, June 28, 2018)*

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

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

Read the full case decision here.

## Delaware Take-Home Summary Judgment Reversed for Paper Manufacturers

*(Supreme Court of Delaware, June 27, 2018)*

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

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

Read the full case decision here.

## Illinois Appellate Court Affirms Summary Judgment on Conspiracy Claims

*(Appellate Court of Illinois, June 19, 2018)*

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

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

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

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

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

*(Superior Court of Pennsylvania, June 12, 2018)*

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

On appeal, the plaintiff took exception that the trial court found him not qualified to testify about his exposure to asbestos products. However, the court quickly noted that the plaintiff had not raised that issue in his appeal and therefore waived that issued. Secondly, the plaintiff argued the trial court "ignored evidence" as to his exposure. According to the plaintiff, a genuine issue as to material fact existed. The court noted the standard for summary judgment which permits summary judgment when "no genuine issue of material fact" exists. Further, the court relied on the standard for summary judgment in asbestos cases which requires the plaintiff to "show that he inhaled asbestos fibers shed by the specific manufacturer's product." Here, the court noted that the trial court concluded that the plaintiff's evidence was nothing more than speculation. That finding did not raise a genuine issue as to material fact. Accordingly, summary judgment was proper and therefore affirmed by the court.

Read the case decision here.

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

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

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

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

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

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

Plaintiff Margie Taylor, the executor of the estate of her father Russell Young, originally filed claims against Goodyear Tire & Rubber Company in the Cuyahoga County Court of Common Pleas, alleging that Young was exposed to asbestos from work on aircraft brake linings during his employment with Goodyear Aerospace Corporation. Goodyear filed a motion for summary judgment on premises liability, negligent undertaking, and intentional tort claims, which was granted by the court in an entry on the electronic "File & Serve" docket, and journalized with the Clerk of Courts with language indicating "there is no just reason for delay pursuant to Ohio Rule of Civil Procedure 54(B)." The plaintiff moved to vacate the 54(B) language of the summary judgment order, which was granted on the File & Serve docket, but never journalized. The Cuyahoga County case was subsequently dismissed.

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

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

Read the full decision here.

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

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

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

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

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

Read the full decision here.

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

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

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

In its analysis of the facts, the court noted that the plaintiff's interrogatory answers in the case were verified on "information and belief," and included a chart titled "Jobsite Specific Exposure History," which listed product manufacturers by name, and included Fiberite. The sole witness in the action was decedent's son, who admitted that he had no knowledge of any of the products or materials used at Diemolding, or whether they contained asbestos. In opposition to Fiberite's motion, the plaintiff submitted deposition testimony from a Diemolding employee from an unrelated prior case that identified Fiberite products at Diemolding. There was no dispute that Fiberite had sold products to Diemolding during relevant time periods.

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

Read the full decision here.

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

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

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

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

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

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

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

Read the full decision here.

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

*(Supreme Court of Wisconsin, May 15, 2018)*

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

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

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

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

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

Read the full decision here.

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

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

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

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

Read the full decision here.

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

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

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

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

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

Read the full decision here.

## Claims Against Insulation Supplier Barred By Government Contractor Defense

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

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

Defendant Metalclad brokered Unibestos to the United States Navy, and filed a Motion for Summary Judgment, stating that the plaintiffs' claims were precluded under the government contractor defense which shields military contractors from state tort law liability for defects in military equipment supplied to the United States. Specifically, Metalclad argued that it met the three elements of the government contractor defense: 1) the United States approved reasonably precise specifications; 2) the equipment conformed to those specifications; and 3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not the United States.

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

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

Read the full decision here.

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

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

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

For the second requirement, the plaintiffs argued that "if Rohr were to actually search their records … they would uncover the components used to make and assemble the products at issue." The court found this argument to be mere speculation, particularly since Rohr's records were the subject of numerous discovery disputes. The court had recently denied the plaintiffs' motion for sanctions, concluding that Rohr took steps that reasonably complied with a January 2018 discovery order. Therefore, the plaintiffs failed to meet their burden of demonstrating that a Rule 56(d) continuance should be granted, and failed to present any evidence of Rohr's liability. Summary judgment was accordingly entered.

Read the full decision here.

## Other Summary Judgement Decisions

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

# Verdict Reduction Decisions

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

*(Middlesex County, New Jersey)*

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

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