

The National Forum for Environmental & Toxic Tort Issues (FETTI) Winter/Spring 2015 Case Law Update Newsletter

In 2001, the Midwestern Environmental Claims Association (“MECA”) changed its name to **The National Forum for Environmental & Toxic Tort Issues** (“FETTI”) in order to better describe its origins and purpose. FETTI was created by the environmental sector of the insurance industry – specifically for the industry. It is dedicated to the professional development of its members in a cost effective environment. Membership is open to individuals, companies and firms actively engaged in the adjustment, settlement and defense of casualty or property claims arising out of environmental damage or exposure to toxic substances.

Each year our organization convenes in Chicago to host a world-class seminar on a broad range of environmental issues with nationally recognized speakers.

FETTI will convene once again from October 7-9, 2015 in Chicago at the Union League Club.

In an effort to update the FETTI membership, the following summaries consist of recent environmental and toxic tort case law updates.

The End of Double-Dipping?

Governo Law Firm LLC

Marisa Howe

(617) 532-9201

Mhowe@GOVERNO.com

On January 10, 2014, North Carolina Bankruptcy Court Judge Hodges issued an opinion that exposed a “startling pattern of misrepresentation” by some plaintiffs’ attorneys in asbestos litigation and concluded that the “withholding of exposure evidence by plaintiffs and their lawyers was significant and had the effect of unfairly inflating” recoveries. *In re Garlock Sealing Techs.*, No. 10-31607, at 35, 37 (Jan. 10, 2014, Bankr. W.D.N.C.).

As part of gasket manufacturer Garlock Sealing Technology LLC’s bankruptcy process, Judge Hodges sought to determine the financial liability for present and future mesothelioma claims based on exposure to its asbestos-containing gaskets. The Court rejected the claimants’ estimate of \$1 to 1.3 billion in liability, and agreed with Garlock’s ten-times lower estimate of \$125 million. Judge Hodges concluded that the claimants’ estimate was unreliable because it was based on amounts Garlock had paid to settle previous asbestos cases and the Court’s examination of Garlock’s settlement history and prior asbestos litigation revealed widespread evidence of abuse and misrepresentation.

To assist in his determination, Judge Hodges permitted full discovery in fifteen of Garlock's previously settled asbestos cases. The court found evidence of exposure to bankrupt products was withheld in all 15 cases. The Court observed that after these cases settled, the plaintiffs' attorneys would file additional claims against an average of nineteen bankrupt company trusts, alleging that their clients were exposed to those products as well. The Court concluded there was a pattern of misrepresentation based upon the circumstances. Plaintiffs who were unable to identify exposure to products of particular defendants in a tort case against Garlock were later able to identify products of those bankrupt entities products as a source of exposure in bankruptcy claims. The Court then rejected claimants' use of historical settlement data as a basis for determining Garlock's liability, concluding that the amounts were inflated.

The next chapter of this saga began in the spring of 2014 when Garlock's former codefendants filed a motion to allow them access to the sealed testimony and exhibits that the court used in making its conclusions. The codefendants noted that they too may have been defrauded. Several other interested parties, including *Legal Newline*, filed similar motions requesting access to sealed filings in response to Judge Hodges' decision to keep portions of the trial and documents confidential. Judge Hodges initially denied this request and the former codefendants and other interested parties appealed. On July 15th, US District Judge Cogburn ruled in favor of public access of the documents noting that "as a gatekeeper, a judge must consider sealing as the exception to rule." The matter was remanded back to Judge Hodges for handling of the unsealing process. On October 16th, Judge Hodges held a hearing and ordered all documents to be unsealed.

Meanwhile, the Asbestos Claimants' Committee ("ACC") filed a motion to reopen the record of the estimation proceeding in order to conduct more discovery, alleging that Garlock committed fraud upon the court by making misleading statements in its pleadings. Garlock opposed the ACC's motion stating that the ACC provided "no basis to question the estimation record or the court's decision." Judge Hodges denied the ACC's motion at a hearing in December, reportedly finding that there was no misconduct and that none of the arguments made by the ACC would change the outcome of the case.

Many are eager to review the documents unsealed by Judge Hodges, but to date the deadline for their production has come and gone. The parties continue to battle. It is unlikely that the true scope of potential "double dipping" will ever be known, but many hope that the Garlock bankruptcy saga will help ensure that the tort system and the bankruptcy system work together to fairly compensate those injured by asbestos. Is the Garlock narrative the turning point for bankruptcy transparency in the asbestos litigation? The intense focus on the asbestos compensation process will likely help, but the actual scope of any lasting impact is unclear.

Governo Law firm represents clients in toxic tort, asbestos and other complex regulatory and litigation matters. If you have questions or would like additional information, please contact Marisa Howe (mhowe@governo.com), Colin Holmes (cholmes@governo.com), or David Governo (dgoverno@governo.com).

Third Circuit Resuscitates Class Action for Alleged Fraudulent Defense Scheme

Marks, O'Neill, O'Brien, Doherty & Kelly, P.C.

Dennis C. Schmieder

(856) 663-4300

dschmieder@moodklaw.com

In a precedential ruling that could potentially have far reaching implications, the U.S. Third Circuit Court of Appeals in Williams v. BASF Catalysts LLC, No. 13-1089 (C.A. 3, Sept. 3, 2014) overturned the District Court's ruling which had dismissed Plaintiffs' case in its entirety. The Court of Appeals reinstated actions sounding in fraud against the law firm Cahill Gordon and Reindel and its client, BASF Catalysts, which had been dismissed previously based on the New Jersey litigation privilege.

Williams is a class action lawsuit brought by the survivors of original asbestos injury suits against Defendants Engelhard and its successor, BASF Catalyst LLC, alleging a sustained plot by BASF and its counsel, Cahill Gordon & Reindel, to mislead actual and potential asbestos plaintiffs into believing that BASF's talc products did not contain asbestos. Plaintiffs contend that Defendants destroyed and concealed documents that proved its talc products contained asbestos. Plaintiffs allege that Defendants' fraudulent actions caused them to settle or dismiss their initial claims that they would otherwise have pursued.

By way of overview, Defendant Engelhard operated a talc mine in Johnson, Vermont from 1967-83.¹ Talc obtained from this mine was processed into such products as Emtal Talc and G&S Talc. These products, in turn, were used in such items as wall board, joint compound, auto body filler, and children's balloons. Testing performed on samples from the Johnson mine in the 1970s and 1980s concluded that this talc contained asbestos. Plaintiffs allege that, despite these findings, Defendants continued to publicly state and represent that the talc was asbestos free.

In 1979, David Westfall, an employee of an Engelhard subsidiary, brought suit for exposing his deceased relative to asbestos. Discovery exchanged in the Westfall lawsuit included tests confirming that Engelhard's talc contained asbestos. Moreover, Glenn Hemstock, an Engelhard scientist and executive, gave two days of testimony in Westfall which confirmed company knowledge of asbestos in the talc. After the Hemstock depositions, the Westfall case was settled and the agreement included a confidentiality clause which prohibited the parties from discussing the case or sharing the evidence.

¹ Engelhard was subsequently purchased by BASF.

In the wake of the Westfall litigation, and allegedly in anticipation of a deluge of asbestos-related lawsuits, Hemstock circulated a memorandum to Engelhard employees entitled “DOCUMENTS RETRIEVAL-DISCONTINUED OPERATIONS”. The memorandum directed Engelhard employees to collect all documents relating to its talc products because “it is the policy of Defendants Corporation to avoid undue accumulation of documents that are no longer likely to be needed in our business operations.” Williams at pp. 10-11. Thereafter, the documents were either destroyed or otherwise hidden. Then, Plaintiffs allege, Engelhard in conjunction with Cahill, manufactured favorable evidence including false affidavits, false and doctored expert reports, and false discovery response verifications which were later used to short circuit future asbestos claims. The effect of these documents, Plaintiffs allege, resulted in small settlements or outright dismissals of otherwise meritorious claims.

This practice continued for nearly 25 years until the alleged misdoing was discovered when a former Engelhard research chemist, David Swanson, testified in the New Jersey case Paduano v. Ace Scientific Supply, Co., No. MID-L-2976-09. Swanson appeared for deposition as a fact witness on behalf of his daughter, Donna Paduano, who had alleged that take-home exposure from her father’s work at Engelhard caused her peritoneal mesothelioma. Swanson testified that Engelhard talc contained asbestos and that he was instructed by Hemstock to turn over all his documents related to talc. He also testified that the Johnson mine was closed because it contained asbestos. During discovery in Paduano, testing documents were produced for the first time since Westfall that confirmed the presence of asbestos in Engelhard talc.

Against this backdrop, Plaintiffs initiated the Williams lawsuit in the District Court of New Jersey seeking, *inter alia*, an injunction against the future invocation of *res judicata* based upon past state court judgments and a declaration that BASF and Cahill committed fraud. Defendants moved to dismiss the case arguing that Plaintiffs had not adequately plead their claims and that the District Court lacked the authority to order the requested relief due to the Anti-Injunction Act or the principles of justiciability. Judge Stanley Chesler found that the Plaintiffs’ fraud claims were barred by New Jersey’s litigation provision which generally protects an attorney from civil liability arising from statements made in the course of judicial proceedings. In doing so, the action was dismissed in its entirety.

On appeal, the Third Circuit determined that the District Court erred in dismissing the fraud claim based on the New Jersey litigation privilege. The Court reasoned that the privilege has never been “applied to shield systematic fraud directed at the integrity of the judicial process” and should not be used for that purpose. Williams at p. 18. They found the privilege is not without limit and was only intended to protect attorneys from civil liability arising from words used in the course of judicial proceedings, to foster and encourage open communication, and to provide the parties with an avenue to explore the truth without fear of recrimination. The Court found that Defendants’ behavior did not advance these goals and refused to extend the privilege in order to “immunize systematic fraud” by permitting false and misleading statements in the course of judicial proceedings. Williams at p. 20. In ruling so, the Court reinstated Plaintiffs’ fraud claim.

With regard to the allegation of fraudulent concealment, the Court again overturned the District Court's ruling. Analyzing New Jersey law, the Court held it was sufficient to allege that the Plaintiffs' personal injury suits suffered as a result of the concealed and destroyed evidence finding the Plaintiffs were "damaged in the underlying action by having to rely on an evidential record that did not contain the evidence defendant concealed." Rosenblit v. Zimmerman, 766 A.2d 749, 758 (N.J. 2001). The Court dismissed Defendants' argument that Plaintiffs would have to demonstrate that they would have otherwise succeeded in the underlying action. In rejecting this argument, the Court found that a spoliation injury may exist where a party's conduct affected the size or existence of the damages awarded at trial and that the plaintiff can recover whether he was successful in the original litigation or not.

Finally, the Court determined that the District Court could grant relief, including declaratory and injunctive relief, for the fraud and fraudulent concealment claims at issue in this litigation. However, the Court affirmed the District Court ruling that it could not grant all of the relief sought by Plaintiffs. The Court held that Plaintiff failed to present a "whole or ripe" controversy for declaratory and injunctive relief to enjoin Defendants from invoking *res judicata*, laches, preclusion, and statute of limitations doctrines, or other similar issues that will likely arise in future cases. Williams at p. 7 Consequently, the Court reversed in part, affirmed in part, and remanded for further proceedings.

Since the Third Circuit rendered its opinion, Defendants have petitioned for an *en banc* review. As of today, it remains open whether Defendants' petition will be granted. In a sometimes scathing opinion, Justice Fuentes noted that "the New Jersey Supreme Court has never immunized systematic fraud designed to prevent a fair proceeding". He then chided the Defendants attempt to characterize their actions as "a permissible procedural device in bad faith" as recognized in Loigman v. Twp. Comm. of Middletown, 889 A.2d 426, 437 (N.J. 2006).

They rigged the game from the beginning. Thus, we cannot accept, as BASF contends, that its statements were made "to achieve the object of the defense" insofar as they "were made with the aim of defeating Plaintiffs' asbestos personal injury claims and shielding BASF from liability". The New Jersey Supreme Court has observed that seeking truthful, accurate, and non-tainted testimony certainly is the objective of every litigated case. How then an calculated false and misleading statements serve the truth-seeking function of the litigation? According to the complaint, BASF and Cahill were not mischaracterizing the facts; they were creating them. (internal citations omitted)

Williams at p. 23. If upheld, the precedential ruling in Williams makes it clear that the New Jersey litigation privilege should not be construed as a carte blanche for parties to a litigation to engage in fraudulent practices without fear of reprisal; parties who seek to bend the rules do so at their own peril.

**Starting Over – Pennsylvania Reverses Its Longstanding Standard for “Defect” under
Pennsylvania’s Product Liability Law Practice**

Rawle & Henderson LLP

Erik K. Falk

(412) 261-5708

efalk@rawle.com

Julie Nord Friedman

(412) 261-5709

jfriedman@rawle.com

Those of us who have had the pleasure of practicing in Pennsylvania know that Pennsylvania has always had a "unique" version of the Restatement (Second) of Torts, Section 402A, as set forth in *Azzarello v. Black Brothers*, 391 A.2d 1020 (Pa. 1978). Since the time of that decision, and based on case law that developed after *Azzarello*, Pennsylvania's standard for "defect" has been that a product is defective if it lacks any element necessary to make it safe for its intended use. Also, arising out of that standard and the post-*Azzarello* case law, Pennsylvania has always adhered to a "bright line" between 402A concepts and negligence concepts—"never the trains shall meet."

On November 19, 2014, the Pennsylvania Supreme Court overruled *Azzarello*, in a 137 page opinion that reviewed at length the historical development of Pennsylvania's 402A law, *Tincher v. Omega Flex*, No. 17 Map 2013. And so we are back to square one in Pennsylvania for product liability law.

As a starting point, both the plaintiff and defendant in *Tincher* agreed that the *Azzarello* standard "articulates governing legal concepts which fail to reflect the realities of strict liability practice and to serve the interests of justice." Thereafter, approximately half of the opinion contains the court's historical review of the development of Pennsylvania's version of 402A law, resulting in the *Azzarello* standard, along with the subsequent development of the bright line between 402A concepts and negligence concepts. The majority opinion by Chief Justice Castille (now retired) noted that Pennsylvania's 402A law developed in "fits and starts", which ultimately proved "antithetical to the orderly evolution of our decision law." Chief Justice Castille noted that *Azzarello* and its progeny contained statements of law which were taken out of context from the cases which they, in turn, had cited and relied upon. The opinions in those cases owed more to the "idiosyncratic procedural posture" of those cases, rather than attempts to make affirmative statements on the development of Pennsylvania's 402A standard. Ultimately, the case law directing that negligence concepts have no place in Pennsylvania's 402A doctrine led to a series of "puzzling trial directives that the bench and bar understandably have had difficulty following in practice..."

Once *Azzarello* was overruled, as a result of this lengthy historical overview, the Supreme Court ruled that a plaintiff may prove a defective condition by showing either that (1) the danger is unknowable and unacceptable to the average or ordinary consumer, or that (2) a reasonable person would conclude that the probability and seriousness of harm caused by the product outweighed the burden or costs of taking precautions. In its analysis of the foundational principles of product liability law, the Supreme Court harkened back to basic law school tort classes, and examined the duty of a supplier of a product under 402A, noting "a person or entity engaged in the business of selling a product has a duty to make and/or market the product—which is expected to and does reach the user or consumer without substantial change in the condition in which it is sold—free from a defective condition unreasonably dangerous to the consumer or the consumer's property."

Having defined the duty, there must therefore be a breach of the duty—again harkening back to basic law school tort class. The Supreme Court noted that two standards have emerged in America's 402A law to evaluate whether a duty has been breached, namely the "consumer expectations" test and the "risk-utility" test. These tests, of course, are known to most product liability practitioners. The Supreme Court analyzed the limitations and shortcomings of each test, and refused to adopt either test as the standard in Pennsylvania. Rather, the Supreme Court noted that which test would be applicable, and the evidence necessary to support and/or rebut that test, is entirely case specific.

The Supreme Court also addressed the issue of whether the product liability standards of the Restatement (Third) of Torts would be adopted in place of the *Azzarello* standard. The Court declined to do so, but nevertheless analyzed many of the principles of the Restatement (Third) within the context of its discussion of duty, breach of duty and the evidence needed to establish/rebut the breach under the consumer expectations and risk-utility tests.

Essentially, in the second half of this opinion, after this lengthy analysis of duty, breach, and the kinds of evidence needed to establish breach and/or rebut the existence of a breach, the Supreme Court "punted" all of these decisions to a future day, urging that the development of the case law on these issues requires case-by-case, fact-by-fact analysis.

Which begs the most important practical question for the practitioner in Pennsylvania: where to from here? The Supreme Court allows the plaintiff, as the "master" of his/her claim, to pick whether he/she will proceed under the consumer expectations or risk-utility test. However, a defendant can always challenge that choice, based on the limitations and shortcomings of that theory, as applied to the particular facts.

Moreover, the Court's opinion makes it clear, as some of us have remarked, that Pennsylvania no longer has any established law on 402A, particularly with regards to the issue of the types of evidence that is admissible to establish or rebut the breach of the duty. *Azzarello's* "bright line" between negligence and 402A is clearly gone, with the court noting that "where evidence supports a party requested instruction on a theory or defense, a charge on the theory or defense is warranted," something that was clearly not permissible under *Azzarello's* bright line standard.

Thus, issues of compliance with governmental standards, compliance with industry standards, state of the scientific/technical art for the product in question at the time of the product's marketing, all previously forbidden under the *Azzarello* bright line standard as “negligence” concepts, are now clearly fair game for both sides.

What does this all mean for product liability law in Pennsylvania? Essentially, it means that product liability practitioners in Pennsylvania are dealing with a *tabula rasa*. We are back to square one. Everything is fair game, and everything is case specific and fact dependent.

Illinois Passes New Law Exempting Asbestos-Related Claims from Ten-Year Construction Statute of Repose

Foley & Mansfield, PLLP

Jacob D. Sawyer

(312)254-3805

jsawyer@foleymansfield.com

Claire C. Kossmann

(312) 254-3800

ckossmann@foleymansfield.com

On December 19, 2014, outgoing Illinois Governor Pat Quinn signed into law Illinois Public Act 098-1131, exempting asbestos-related claims from Illinois's long-standing construction statute of repose. The statute effectively removes the ten-year statute of repose in construction-related cases when the plaintiff claims injury as a result of exposure to asbestos. This law has the potential to increase asbestos-related litigation and to expand liability to previously un-reachable defendants. However, the new law's constitutionality is suspect and it may be vulnerable to constitutional challenge on multiple grounds.

History of Public Act 098-1131

Public Act 098-1131 was first introduced as Senate Bill 2221, which was originally intended to amend the Clerk of Courts Act and addressed reimbursements that State correctional institutions received for administrative assistance. Senate Bill 2221 was later amended to exempt from the Illinois construction statute of repose all claims arising out of injury caused by the release of “any pollutant” (Amendment No. 2).² This amendment was filed in the Illinois House of Representatives on November 25, 2014—the day before Thanksgiving.

After referral of Amendment No. 2 to the Rules Committee and Judiciary, Senate Bill 2221 was again amended on December 2, 2014 (Amendment No. 3) to narrow the scope of the exemption from claims based upon injury resulting from “any pollutant” to just those claims based upon injuries resulting from “asbestos.”³

² Senate Bill 2221, House Floor Amendment No. 2, filed November 25, 2014.

³ Senate Bill 2221, House Floor Amendment No. 3, filed December 2, 2014.

That same day, the Illinois House of Representatives voted to approve Amendment No. 3 and passed Senate Bill 2221, as amended. The Senate passed the bill the following day. There exists some speculation that the passage of Senate Bill 2221 was the effort of the lame duck session of the Illinois General Assembly to push the measure through before Republican Governor-Elect Bruce Rauner takes office.⁴

Governor Pat Quinn signed Senate Bill 2221 into law on December 19, 2014, which bill thereby became Public Act 098-1131. The new law officially amends 735 ILCS 5/13-214, which statute codifies Illinois's construction statute of repose. Previously, the statute provided in relevant part:

No action based upon tort, contract or otherwise may be brought against any person for an act or omission of such person in the design, planning, supervision, observation or management of construction, or construction of an improvement to real property after 10 years have elapsed from the time of such act or omission.⁵

Public Act 098-1131 amends this statute by adding subsection (f), which provides that the statute “does not apply to an action that is based on personal injury, disability, disease, or death resulting from the discharge into the environment of asbestos.”⁶ The law will take effect on June 1, 2015.

Potential Ramifications of Public Act 098-1131

This amendment effectively eliminates the ten-year statute of repose for claims arising out of the “design, planning, supervision, observation or management of construction, or construction” of improvements to real property if those claims are related to an injury caused by alleged exposure to asbestos. This exemption has the potential to affect not only the number of asbestos cases filed in Illinois, but also the defendants named therein. Potential asbestos defendants that have been insulated from the asbestos litigation by virtue of the construction statute of repose—including contractors, architects, and engineers—may now be subject to liability for their respective roles in construction projects involving the use of asbestos-containing products.

Potential Constitutional Challenges to Public Act 098-1131

As with any statute with this potential breadth and depth, Public Act 098-1131 may be subject to various constitutional challenges. First, Public Act 098-1131 may meet a challenge that the Act violates the Special Legislation Clause of the Illinois Constitution, which states that “The General Assembly shall pass no special or local law when a general law is or can be made applicable”⁷ and which “expressly prohibits the General Assembly from conferring a special benefit or exclusive privilege on a person or a group of persons to the exclusion of others similarly situated.”⁸

⁴ See, e.g., Isringhausen Gvillo, Heather: ‘Rammed through’ Illinois asbestos bill could face constitutional challenge; Critics say it could impose unending liability, Legal Newsline (December 4, 2014), retrieved from <http://legalnewsline.com/issues/asbestos/253822-rammed-through-illinois-asbestos-bill-could-face-constitutional-challenge-critics-say-it-could-impose-unending-liability>.

⁵ 735 ILCS 5/13-214(b).

⁶ Illinois Public Act 098-1131.

⁷ Ill. Const. 1970, art. IV, § 13.

⁸ *Best v. Taylor Mach. Works*, 179 Ill. 2d 367, 390-91 (1997).

This provision was one of several grounds upon which the Civil Justice Reform Amendments of 1995 were struck down in the 1997 case *Best v. Taylor Machine Works*, because these amendments imposed a limit on the amount of damages recoverable by plaintiffs with the most severe injuries but imposed no such limit for plaintiff with lesser injuries.⁹ The Special Legislation clause has also been used to prevent the retroactive application of legislation that allowed certain Fair Employment Act plaintiffs to file a complaint in circuit court, but not other plaintiffs, thereby subjecting some employers to open-ended liability but not others.¹⁰ Using this rationale, a potential challenge to Public Act 098-1131 exists on the ground that it arbitrarily subjects only those defendants whose construction activities involved the use of asbestos-containing products to liability while all other construction defendants retain the protection of the construction statute of repose.

Perhaps the most evident challenge is based upon the violation of due process that occurs when a previously time-barred claim is revived by the legislature. Illinois courts have consistently held that the legislature lacks the power to revive previously time-barred claims once they are barred.¹¹ This is because the right to assert a statute of limitations bar as a defense to a claim after the statute has run is a *vested right* of the would-be defendant that cannot be taken without due process of law.¹² The same vested right inures to a defendant upon the expiration of a statute of repose.¹³

Parting Thoughts

Although constitutional challenges to Public Act 098-1131 will likely be forthcoming, it is unknown if any such challenge will be decided before the effective date of the new law of June 1, 2015. Therefore, those potential defendants who were involved in the construction of improvements to real property in the 1960s, 1970s, and 1980s who may be subject to liability under the new law—and their insurers—should seek advice regarding how best to prepare for any potential claims and how to proceed under the new law.

A Practical Approach to Toxic Tort and Products Liability: *May v. Liquid Sys. Corp.*

Hawkins Parnell Thackston & Young LLP
Brandon Whit Maxey
(214) 780-5138
bmaxey@hptylaw.com

Maryland has joined the growing list of states that have expressly rejected plaintiffs' creative attempts to hold equipment manufacturers responsible for injuries allegedly caused by replacement parts used in connection with the maintenance and repair of their equipment. Citing the landmark decision in *O'Neil v. Crane Co.* along with decisions from other states that follow the majority view, the Maryland appellate court adopted the Bare Metal Defense. *See May v. Air & Liquid Sys. Corp.*, 2014 Md. App. LEXIS 113, *10-11 (Md. Ct. Spec. App. 2014)

⁹ 179 Ill. 2d at 402-404.

¹⁰ *Wilson v. All-Steel, Inc.*, 87 Ill. 2d 28, 40 (1981).

¹¹ *See, e.g., M.E.H. v. L.H.*, 177 Ill. 2d 207 (1997); *Sepmeyer v. Holman*, 162 Ill. 2d 249 (1994); *Wilson*, 87 Ill. 2d 28.

¹² *See Sepmeyer*, 162 Ill. 2d at 254-55, citing *Board of Education of Normal School District v. Blodgett* (1895), 155 Ill. 441, 40 N.E. 1025 (“We find the issue well settled that the expiration of the statute of limitations creates a vested right beyond legislative interference.”); *Wilson*, 87 Ill. 2d at 42 (“The proposition that a limitations defense which has fully accrued vests a property right in the defendant entitled to due process protection is a general rule followed by many jurisdictions.”).

¹³ *M.E.H. v. L.H.*, 177 Ill. 2d at 214-15.

(citing *O'Neil v. Crane Co.*, 266 P.3d 987, 1006 (Cal. 2012); other citations omitted). In *May*, the Court considered whether a manufacturer of steam pumps had a duty to warn of the dangers of asbestos contained in products that the manufacturer neither made nor sold. *Id.* at *4. In limiting liability to those in the chain of distribution, the Court held that the manufacturer owed no such duty because it did not make or place those products into the “stream of commerce.” *Id.* at *10. As discussed below, this decision takes the majority approach of adopting the Bare Metal Defense, and represents the most practical — and correct — application of established products liability law.

The defendants in *May* manufactured steam pumps that they sold to the United States Navy for use on naval vessels. *Id.* at *2. The plaintiff, who served on seven vessels, claimed exposure to asbestos from his work involving replacement gaskets and packing in these pumps. *Id.* at *2-3. Because the pumps had all been serviced on many prior occasions before plaintiff worked on them, there was no reason to believe he encountered gaskets or packing that had been incorporated in the equipment when it was built. *Id.* These replacement gaskets were neither made nor sold by the defendant-manufacturers, but instead were later purchased from other suppliers and installed by the Navy. *Id.* at *3-4.

The plaintiff argued that the defendants owed a duty to warn because it was foreseeable that asbestos-containing materials would be used in conjunction with their product. *Id.* The Court rejected this argument, holding that manufacturers must place the product into the stream of commerce to be held liable under such a theory. *Id.* at *10. Notably, the plaintiff also argued that manuals provided by the manufacturers caused the maintenance work to be performed in an unsafe manner and “required” the use of asbestos. *Id.* at FN 3. However, the court dismissed this argument in a footnote. *Id.* at FN 3.

The Court based its decision on a prior Maryland case, as well as the clear majority view on this issue. In the 1998 case of *Ford Motor Co. v. Wood*, the Maryland Court of Special Appeals considered whether Ford owed a duty to warn of the dangers of replacing asbestos-containing brakes, regardless of the manufacturer of the replacement brake parts. *Id.* at *7-8 (discussing *Ford Motor Co. v. Wood*, 703 A.2d 1315 (Md. Ct. Spec. App. 1998)). Though the *Wood* court held that this issue was not tried on this theory, the court did state that “Ford would have no liability for replacement or component parts that it neither manufactured nor placed into the stream of commerce.” *Id.* at *8 (citing *Wood*, 703 A.2d at 1330-31). The *May* Court held that the stream of commerce discussion in *Wood* was not dicta, but was authoritative.

The *May* Court discussed the approach taken by the majority of courts that have considered this issue. *May*, 2014 Md. App. LEXIS 113, at *11-14. Most notably, recent decisions from California and Washington State have served as the basis for the national trend on the issue. *Id.* (citing *O'Neil v. Crane Co.*, 266 P.3d 987 (Cal. 2012); other citations omitted). These cases illustrate that holding a manufacturer liable for products that it did not make or otherwise place into the stream of commerce conflicts with well-established products liability law. *Id.* (discussing this case law in relation to §402 of the Restat. (Second) of Torts (1965)). This approach is generally referred to as the Bare Metal Defense. The *May* Court held that the defendant-manufacturers owed no duty to warn for replacement and component parts that they neither made nor placed into the stream of commerce.

The *May* plaintiffs based their argument on the extreme minority view taken by some New York state courts. *See May*, 2014 Md. App. LEXIS 113, at *19-20. In *Berkowitz v. A.C. & S., Inc.*, a New York appellate court issued a summary opinion that upheld the denial of defendants' motion for summary judgment. *See* 288 A.D.2d 148, 149 (N.Y. Sup. Ct. 2001). The *Berkowitz* defendants manufactured pumps and valves, which were sold to the U.S. Navy. *Id.* Despite the fact that *Berkowitz* gives no clear holding and lacks a detailed analysis of law and fact, plaintiffs have had limited success in New York state courts in stretching this one-paragraph opinion to advance the argument that manufacturers have a duty to warn for asbestos-containing replacement and component parts made by third-parties. *See* Mark A. Behrens, *Dummitt v. Crane Co.: New York's Highest Court Should Reaffirm Its "Stream of Commerce" Approach to Product Liability and Confirm that New York Law is in Harmony with the Clear Majority Rule Nationwide*, 29:16 MEALEY'S LITIG. REP.: ASBESTOS 1-2 (Sept. 24, 2014). However, this approach likely conflicts with foundational products liability law in New York and may be overturned soon. *See Id.* at 2. Further, federal courts in New York have rejected the plaintiffs' reliance on *Berkowitz* and have applied the majority stream of commerce approach taken in *May*. *Id.* Taking this into consideration, the *May* Court found *Berkowitz* to be "thoroughly unpersuasive." *May*, 2014 Md. App. LEXIS 113, at *20.

The approach argued by plaintiffs would "impose an excessive and unrealistic burden on manufacturers" to "investigate the potential risks of all other products and replacement parts that might foreseeably be used with their own product and warn about all of these risks." *O'Neil v. Crane Co.*, 266 P.3d 987, 1006 (Cal. 2012). This not only goes against traditional notions of products liability law, it also flies in the face of the important policy of practicability. As this issue continues to be litigated, courts and practitioners should be mindful of their specific jurisdictions' approach, as well as the stream of commerce approach taken by the clear majority of courts that have considered the issue.

Do Pleural Plaques Confirm an Independent Risk for Lung Cancer?

Foley & Mansfield, PLLP
Abigail P. Adams
(510) 590-9500
aadams@foleymansfield.com

Introduction

On December 15, 2014, the American Journal of Respiratory and Critical Care published an article entitled "Asbestos Exposure, Pleural Plaques, and the Risk of Death from Lung Cancer" by Parion, Andujar, Rinaldo, *et al.* The article acknowledges the controversy surrounding the correlation between asbestos-induced pleural abnormalities and the increased risk of lung cancer, ultimately concluding that pleural plaques may be an independent risk factor for lung cancer death in asbestos-exposed workers. The authors further opine that this conclusion supports using CT scans as a lung cancer screening and detection tool in high-risk populations. The authors allege the study is unique because until now no study has documented an association between pleural plaques detected by CT scans and lung cancer; other studies of this nature have solely utilized x-ray data to support the pleural plaque-lung cancer relationship.

I recently attended a deposition of a plaintiff's expert who cited this article for the proposition that pleural plaques increase the risk for lung cancer. An excerpt from the deposition:

Q. Pleural plaques do not cause cancer; is that correct?

A. Well, you know, that's a very interesting question. And the reason that's an interesting question is because there's a new paper that . . . says that in a population of individuals who were studied prospectively with pleural plaques the investigators found there was an increased risk of getting a lung cancer. . . . In this case it was pleural plaques and years later do these people have an increased risk of getting lung cancer, the answer is yes.

Since pleural plaques are the most common manifestation of asbestos exposure, a study concluding that asbestos-exposed individuals with pleural plaques are at a high risk of mortality from lung cancer could have effects on preventative damages claims and fear of cancer damages claims.

The Study

Study administrators issued an asbestos-related disease screening in four French regions from October 2003 through December 2005 to volunteer participants who were retired or unemployed workers with a history of occupational exposure to asbestos. The individual volunteers received CT scans and radiologists recorded any interstitial or pleural abnormalities, including pleural plaques, on a standardized form. This led to a six-year follow-up study comprised of 5,402 men who each had a history of occupational exposure to asbestos. Of the 5,402 member cohort, the authors recorded 36 cases of death from lung cancer, and of those 36, 17 individuals registered pleural plaques on CT (47%) and 19 did not (53%). Based on this data, the authors conclude that there is a significant association between pleural plaques and lung cancer mortality.

The strengths of the study include a large sample population of men who underwent an individual estimation of cumulative occupational exposure to asbestos, and an accurate determination for pleural plaques based on CT scans interpreted by thoracic radiology experts. Further, this was a prospective study and adjustments were made for the participants' smoking history and status.

Despite the study's strengths, it also has several weaknesses. The authors only accounted for occupational exposure to asbestos and did not consider the role of co-exposure to other occupational lung carcinogens. Also, experts did not systematically examine the cohort's pulmonary nodules during their randomized assessment of the CT scans, so the authors cannot assume that all cases of lung cancer deaths were incident cases; some may have been prevalent. The authors further argue that the correlation between pleural plaques and lung cancer mortality may be even greater than the statistical data realized in this study. The authors did not have access to the cohort members' individual medical files, and were forced to rely on cancer registries and death certificate data for the individuals' causes of death, leaving room for error.

The authors also noted that the cancer mortality rate in the cohort was lower than expected when compared with national standardized mortality ratios. The authors attribute this difference to the constitution of the cohort based on voluntary participation. If potential lung cancer showed up on the initial CT scan, then it is likely the subject did not return the CT scan and participate in the study but instead sought treatment elsewhere. This could have resulted in a healthy worker effect in the study population.

Further, the authors explain that selection bias on inclusion in the cohort may be a weakness in the study because only 37 of the 5,402 cohort members had asbestosis on the basis of the CT data, which is a very low prevalence. A “selection bias” refers to the selection of individuals or data for analysis that thwarts randomization, rendering the sample unrepresentative of the population intended to be analyzed. Such a selection bias could have occurred here where the overall frequency of pleural plaques in the subjects of the cohort was only 20%, indicating that many subjects had not experienced heavy levels of cumulative asbestos exposure.

Finally, although the authors do not explicitly discuss their apparent partiality towards encouraging screening for lung cancer by CT scan, I must suggest the apparent possibility of such a bias. Preventative CT scanning, for use as a cancer-screening tool, is a topic that has historically been controversial in the United States. My research did not yield any prevalent bias on behalf of the lead authors, but given that the authors’ self describe their conclusion as an additional criterion in the definition of high-risk populations eligible for CT screening, such a bias is worth suggesting.

Analysis and Conclusion

Although the article concludes that the study results support the theory that asbestos-exposed subjects with pleural plaques are at high risk of mortality from lung cancer, the article also admits that the potential link between pleural plaques and lung cancer is still not formally demonstrated. Of the 5,402 member cohort 47% (less than half) of the individuals whose CT scans registered pleural plaques died from lung cancer. While the study is prospective in nature, and utilized CT scans instead of x-rays, the authors themselves admit there are weaknesses in this study. One should be mindful of this article’s existence and privy to its strengths and weaknesses when deposing plaintiffs’ medical experts in non-malignancy cases. Although the article contributes to the debate as to whether pleural plaques are an independent risk for lung cancer mortality, it does not stand for the proposition that pleural plaques cause cancer.

Environmental Forensics for Insurance Coverage Disputes

Exponent

Walter J. Shields, Ph.D.

(425) 519-8700

wshields@exponent.com

Jaana Pietari, Ph.D.

(978) 461-4600

jpietari@exponent.com

Peter Mesard

(510) 268-5009

pmesard@exponent.com

Brian Murphy

(941) 928-6735

bmurphy@exponent.com

Paul Boehm

(978) 461-4601

pboehm@exponent.com

Environmental forensics is the application of tools such as chemical fingerprinting, process engineering, modeling, aerial photogrammetry, and historical research to understand the timing and causes of environmental contamination. Environmental forensics can help in evaluating timing of releases and the contribution of particular sources to the need for remediation — issues that are often argued in insurance coverage cases. This article provides an overview of the techniques and discusses three case studies where environmental forensics methods were used in insurance coverage cases.

Environmental forensics generally involves the reconstruction of past environmental events, such as the timing, types and amounts, and sources of chemical releases to the environment. These questions often relate to understanding the responsibilities for contaminated sites or releases of oil or hazardous wastes in a regulatory and/or legal context. These approaches are also integral to environmental due diligence for mergers and acquisitions. Techniques such as chemical fingerprinting, chemical fate and transport modeling, hydrogeological investigation, and reconstructing operational histories, among others, are at the heart of many investigations. These methods along with advanced statistics (such as multivariate receptor statistical modeling) to apportion mixtures of contamination to individual sources, continue to evolve and become more sophisticated over the past decade, as have the types of problems to which they are applied. A convenient shelf reference is the recent edition of *Introduction to Environmental Forensics* (Murphy and Morrison 2015)¹⁴. Several insurance case studies follow that illustrate various environmental forensic applications. Please contact the authors if you would like specifics about the cases.

¹⁴ Murphy, BL, and RD Morrison (eds). 2015. *Introduction to Environmental Forensics*, Third Edition. Elsevier, Chennai. 719 pp.

A. Were “sudden and accidental” releases from a lead smelter sufficient to require offsite soil remediation?

A company that had operated secondary lead smelters asserted that its commercial general liability (CGL) insurers were obligated to reimburse the company for environmental costs at over 25 sites. The company argued that the pollution had been accidental and accidental pollution satisfied the CGL policies' "sudden and accidental" exception to the exclusion of environmental claims. One of the larger claims brought by the company was for remediation costs related to historic lead emissions from the Harbor Island smelter in Seattle. This secondary lead smelter operated from about 1938 to 1982. Our client (the policy-holder), asked us to estimate the amount of lead that would have accumulated on the soils of Harbor Island as a result of sudden and accidental releases and determine if the resultant soil concentration would have exceeded EPA's soil cleanup standard.

Temporally sudden and accidental releases of lead were documented to have occurred at various times between 1970 and 1982 as a result of baghouse fires, power outages, equipment failures, and other upset conditions. We developed models to estimate the amount of lead emitted during these events. The emission rates for representative years were back-extrapolated to 1937 to estimate historic emissions. Next, we used air dispersion and deposition modeling to estimate the off-site soil concentration of lead attributed to the accidental releases. We found that the mass of lead transported from the smelter property that was attributable to these sudden and accidental releases over the operating period resulted in concentrations in offsite (i.e., outside the boundaries of the facility) soil were sufficient to trigger environmental response actions by EPA under CERCLA (i.e., greater than 500 mg/kg). These results were not rebutted by the opposing expert and were influential in reaching a favorable settlement.

B. Did environmental harm at a former MGP site occur before the coverage period?

There are several common forensic elements for insurance litigation cases at former Manufactured Gas Plant (MGP) sites:

- Identification of sources of contamination, sometimes using chemical fingerprinting¹⁵
- Identification of the extent to which site contamination resulted from intentional activities
- Likelihood of site contamination moving off-site
- Contemporaneous information available to MGP management regarding the potential for harm to the environment
- The amount of harm occurring during different time periods, including the period of insurance coverage

¹⁵ For example, in reconstructing site history it is often useful to distinguish water-gas tar from coal-gas tar using polycyclic aromatic hydrocarbon (PAH) diagnostic ratios or more sophisticated multivariate statistics. PAH ratios can also be used to distinguish other PAH sources, such as diesel fuel, from MGP tars.

Forensic analysis at MGPs generally involves weaving together three strands: (1) present day patterns of contamination as documented in remedial investigation documents, (2) plant specific historical information, and (3) knowledge of historical development of the MGP industry. We illustrate these issues for a Massachusetts MGP site.

At this site a number of historical activities contributed to contamination, particularly tar contamination. During decommissioning in 1971, tar emulsions and sludges were pumped to an ash pond. Additional tar was trucked to a remote portion of the site, wrapped in plastic and buried in what, at the time, was apparently intended to be temporary storage. A historical mill pond was filled with a mixture of tar, clinker and ash. Tar was stored in a tar pond, in a below ground holder pit that was cracked and leaking, as well as in several storage tanks that were abandoned full of tar. Tar and oil pipes were cut and left to drain. Purifier waste was also buried on site in locations where no operations had occurred.

Historical industry trends cast some light on the situation at this MGP. MGPs competed with motor vehicles for distillate fuels. In the 1930s, many MGPs switched to residual fuels such as Bunker C. This often caused tar-water emulsions to form. If these emulsions contained too much water, they could not be burned in plant boilers, nor could they be sold to the chemical industry. If no other use could be found, these emulsions were disposed of on site. In addition, below ground holder tanks were made of masonry and invariably leaked. This is documented in the industry literature well before 1900.

Exponent was retained by counsel for the insurers to evaluate the historic releases and to determine whether the claims by the policy-holder were valid. The opposing expert at this site claimed that the plant was well run and that there was no tar disposal, only leaks and spills either accidental or related to “acts of God.” However, with one exception none of the accidents or “acts of God” he noted (fires, explosions, hurricanes) had documented tar releases. In the one case, an explosion where tar was released, the documentation included subsequent cleanup, consistent with present-day contamination patterns.

The company was active in various industry organizations where information regarding good practice in environmental management was freely shared. Presentations regarding harm caused by discharge of MGP wastes were made at a number of conferences including one where a senior manager of the company was present. In addition, a company manager wrote a paper in 1920 documenting the harm that could come from discharge of MGP wastes. It appears that, there was an inconsistency between what was advocated by this manager and what was actually done at the site. In addition, throughout the period of tar disposal at this plant there were a number of public hearings and court cases involving injury from MGPs, including another nearby Massachusetts MGP. These events indicate that the operators were aware of the environmental harm caused by their operations and how to avoid such harm¹⁶.

¹⁶ There are a number of judicial decisions indicating that “harm” is the physical/ chemical conditions requiring remediation, which is how we use the term.

There was no evidence of any continuing tar migration in soils after many decades. We were also able to show, using surface water measurements and geological observations indicating a natural barrier, that there was no evidence that the nearby river had been or would be impacted. Thus we concluded that claims of damage to third party off-site property were unfounded. Finally, in a 2009 decision (SJC 10246) the Massachusetts Supreme Judicial Court determined that under CGL policies, liability should be pro-rated by “time-on-the-risk” in the absence of more compelling evidence as to the actual temporal pattern of property damage. This plant began operations before the Civil War and essentially ceased operations by 1952. Because of the lack of evidence of any continuing migration offsite, we concluded that on-site property damage requiring remediation had occurred soon after releases to the environment and well before the period of insurance coverage. The case settled on favorable terms to our client.

C. Did release(s) of perchloroethylene (PCE) from a dry cleaner to soil and groundwater occur during a period of coverage?

Exponent was retained by counsel to an insurer to inspect a former dry cleaning establishment immediately before the interior and foundation were demolished to allow construction of a remediation system. Future remediation costs had been previously estimated to be \$1 million to \$2 million. Counsel was interested in knowing if the date of PCE releases could be established, or at least constrained. Counsel also wanted to know if the assumed remediation approach and costs were appropriate.

We inspected the site prior to demolition and reviewed and evaluated numerous regulatory documents. We further evaluated the areal distribution of PCE impacts to soil and soil gas. Fire department records indicated that the owner had been required to install a secondary containment structure for storage of virgin and spent PCE. Receipts in the owner’s files indicated that the structure was installed during the period of coverage. This secondary containment consisted of a rubberized plastic material bonded directly to the concrete foundation. During our inspection, the secondary containment structure was partially removed — and indications of significant solvent staining was observed and documented in the areas formerly occupied by the spotting board, the dry cleaning machines, and the storage area. The staining was consistent with numerous releases over a long period of time, and given that the staining necessarily occurred *before* the secondary containment was installed, the releases were constrained to have occurred during and before the covered period.

However, the highest concentrations of PCE in soils was not below this secondary containment structure but adjacent to the foundation outside of the building, and likely associated with activities that were NOT covered by the policy. This is based on concentration trends indicating a pathway associated with building modifications that post-dated the installation of the containment structure (and coverage period).

In addition, we reviewed past remediation costs and conducted an evaluation of proposed remediation activities. We found that a number of claimed costs associated with past response actions were not technically justified, nor approved by the oversight agency (e.g., neither reasonable nor necessary). We also proposed an alternative, more cost effective, approach to future remedial actions.

While the evidence indicated that some releases occurred during the covered period, our findings regarding other, non-covered releases and review of past costs and future plans allowed the insurer to resolve the claim at an amount significantly lower than the claim, and well below the policy limits.

D. When did a release of fuel oil that impacted a residential property occur?

Exponent was retained by two insurance companies to determine the date or dates of releases of fuel oil from an underground tank at a residential property in Long Island, NY. The question was which of two policies covered damages to an adjacent property as a result of the releases.

While the offending underground tank had been removed, residues of the released oil remained at various locations along the transport path. Exponent scientists and engineers inspected and sampled the soils at the properties — along the pathway and in the basement of the residence, examined photographs of the removed tanks, determined the meteorological and groundwater conditions, and employed environmental chemical forensic/fingerprinting methods to examine the degradation patterns of the fuel oil at various locations. Combining these multiple lines of evidence — the chemical fingerprinting data with known degradation markers in the residual fuel oil, with rainfall data, groundwater elevation and transport information, and inference on the corrosion of the tank itself, we were able to determine the rough timing of the release and determine that the release could not have occurred after the date of the initiation of one of the insurance policies.

Our report was definitive and removed the need for litigation. The insurance companies used this information to come to an agreement with each other and with the homeowners on the appropriate coverage for the incident.

E. Closing

Environmental forensic techniques are often used in insurance coverage disputes. They are most effective when used as independent lines of evidence. For example, the primary evidence of the timing of a release may be the size and shape of a groundwater plume; however, this evidence could potentially be supported by the chemical composition indicative of weathering, historical records of product use, and the metallurgical analysis of a leak in a tank.

Please contact the authors for more information on any of these case studies. Additional information on environmental forensics can be found at http://www.exponent.com/environmental_forensics/.