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Asbestos Litigation - The Bad Penny That Will Not Go Away

I. Asbestos Claims State of the Union

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A wide variety of industries are being named as defendants in asbestos litigation, ranging from product manufacturers to premises defendants to employers. Specifically as to product manufacturers, plaintiffs are filing against manufacturers of industrial equipment such as valves, pumps, boilers and turbines; equipment component parts such as packing and gaskets; home remodeling products such as joint compound, paint and caulk; and automotive products such as brakes, clutches and gaskets. Additionally, manufacturers of tools utilized in one's job such as air compressors and circular saws are also being named as defendants.

B. Where the claims are being filed: the Judicial Hellholes

Five of the top ten judicial hellholes named for the 2015-2016 year involve venues where asbestos litigation is prevalent: California (#1); NYCAL (#2); City of St. Louis, Missouri (#4); Madison County, Illinois (#5); and Newport News, Virginia (#8).

1. **California:** Although new filings from the state's major asbestos courts of Los Angeles and Alameda County were slightly lower in 2014 (215 total filings in 2014 vs. 236 total filings in 2013), large asbestos verdicts have not abated. For instance, in April of 2015 in *Winkel v. Colgate-Palmolive*, a Los Angeles County jury awarded plaintiff $12.4 million, finding a talcum powder manufacturer liable for a living plaintiff's mesothelioma. Additionally, in November of 2015 in *Emerson v. Union Pacific Railroad*, an Alameda County jury awarded plaintiff $7 million, finding decedent's railroad employer liable for his mesothelioma.

2. **NYCAL (New York Consolidated Asbestos Litigation):** Routine consolidation of NYCAL cases makes it difficult for defendants to receive a fair trial. Not only does consolidation raise due process concerns, but case consolidation has resulted in a total of $324.5 million in jury awards for 14 plaintiffs in consolidated trials during the 2010 to 2014 time period. This has

resulted in an average award of $23 million per plaintiff, an astounding 315% more per plaintiff than the national average award. In 2015, a jury awarded a plaintiff $25 million ($10 million for past and $15 million in future pain and suffering), finding Amoco, a brake grinder manufacturer, 86% responsible for plaintiff's mesothelioma resulting from its failure to warn. Additionally, an exception to New York's joint and several liability allows the imposition of full "deep pocket" liability on a minimally at-fault defendant that is found to have acted with reckless disregard for the safety of others. Plaintiffs' lawyers routinely seek (and NYCAL judges routinely provide) jury instructions to find recklessness in certain situations that result in almost all juries finding the exception applicable.

3. **City of St. Louis, Missouri:** St. Louis is slowly becoming the next Madison County as plaintiffs' lawyers are finding increasingly generous verdicts and helpful judges in St. Louis. For instance, in *Poage v. Crane Co.*, a jury awarded $11.5 million ($1.5 million in compensatory damages and $10 million in punitive damages) to plaintiff in July of 2015, finding Crane Co. liable for a decedent's exposure to packing and gaskets used in its valves while a machinist's mate in the U.S. Navy. Additionally, in February of 2016, a jury awarded $4.1 million to plaintiff in *Urbach v. Okonite*, finding Okonite 5% liable for decedent's mesothelioma as a result of his use of Okonite wiring as an electrician. Judge David Dowd of St. Louis is ignoring Supreme Court precedent of *Daimler AG v. Bauman*, 134 S.Ct. 746 (2014), requiring a defendant to have a business presence in a given state in order to be subject to lawsuits there, when ruling on personal jurisdiction motions to dismiss. In August of 2015, Judge Dowd refused to dismiss a case in which the defendant did not maintain its headquarters or a principal place of business in Missouri and the plaintiff was not exposed to the defendant's products within the state on grounds that the company "consented" to jurisdiction in St. Louis by virtue of complying with a state law requiring it to designate a registered agent in Missouri.

4. **Madison County, Illinois:** Madison County remains the home of approximately one-third of all asbestos lawsuits brought in the United States, 90% of which are filed by out-of-state plaintiffs. "MadCo" judges routinely deny FNC motions, even where the plaintiff never stepped foot in the state of Illinois. Although the filings are still considerable, they have recently declined. 762 total asbestos matters were filed in 2015, down 55% since the highest filing year of 2013 where 1,638 matters were filed. Despite the decline in asbestos filings, Judge Stephen Stobbs

continues to preside over the "rocket docket" that saw, as of mid-October 2014, 1,074 cases set for trial in 2015. This puts considerable pressure on defendants to settle cases. Interestingly, the handful of verdicts in Madison County asbestos cases since 2003 have been defense verdicts, following the $250 million jury award in *Whittington v. U.S. Steel.*

5. **Newport News, Virginia:** Newport News judges routinely issue legal and evidentiary rulings that lower the bar for plaintiffs, which has resulted in plaintiffs achieving the nation's highest win rate at trial (85%). For instance, the lax causation standard places Newport News outside the mainstream by defining a "substantial factor" exposure to be any exposure that was not imaginary. Additionally, products defendants are handcuffed in their presentation of the evidence in that they are barred from presenting dose reconstruction evidence which otherwise might show that their low-dose products were not dangerous and thus no warning was required; and they are barred from presenting evidence of employer knowledge of asbestos hazards.

C. Other Venues of Note

1. **Texas:** In September 2005, the Texas legislature passed S.B. 15, the asbestos/silica litigation reform bill which established a higher burden for plaintiffs to meet when filing a claim. Plaintiffs also must satisfy a strict causation standard. In addition to the "frequency, regularity and proximity" factors, Texas requires an examination of the dosage of exposure to a given defendant's product to determine whether that dose was a substantial factor in causing the alleged injury. *Borg Warner Corp. v. Flores*, 232 S.W.3d 765, 773 (Tex. 2007). Additionally, the Supreme Court of Texas rejected the "any exposure" theory of liability in *Bostic v. Georgia-Pacific Corp.*, 439 S.W.3d 332 (Tex. 2014).

2. **Florida:** In 2005 Floridians saw the passage of the Asbestos and Silica Compensation Fairness Act, which established a higher threshold for plaintiffs filing a claim. The Act requires plaintiffs to file a written report and supporting test results constituting *prima facie* evidence of physical impairment. The Act also bars damages claiming fear or risk of cancer; (2) requires plaintiffs to disclose collateral source payments; (3) eliminates strict liability for sellers (not manufacturers) of asbestos-containing products; and (4) caps potential successor liability at the fair market value of the predecessor's total gross assets at the time of the merger or consolidation. Despite the higher burdens placed on plaintiffs, a Miami-Dade County, Florida jury awarded a living mesothelioma

plaintiff $14 million in August 2015 in *Taylor v. Georgia-Pacific*, finding that his mesothelioma was caused by exposure to joint compound.

3. **Oklahoma:** Until 2013 Oklahoma had been identified as State that adopted significant, positive civil justice reforms. However, that status was threatened by the Oklahoma Supreme Court's declaration in 2013 that H.B. 1603 (known as the Comprehensive Lawsuit Reform Act of 2009) is unconstitutional. It encompassed the "Asbestos and Silica Claims Priorities Act, 76 O.S. § 60, *et seq*."

D. Forum Shopping – How the Courts Are Addressing Forum Non Conveniens Motions

Madison County, Illinois is best known for plaintiffs' forum shopping. The MadCo court continues to routinely and almost universally deny product defendants' motions to dismiss pursuant to the *forum non conveniens* doctrine on the sole basis that defendants cannot meet their burden of showing that another forum is more convenient to *all parties*. The court has ignored the Illinois precedent of *Fennell v. Illinois Central Railroad*, 2012 IL 113812 (Dec. 28, 2012) in denying defense motions to dismiss cases that have no connection to Madison County, much less Illinois. For example, in *Warden v. Caterpillar, Inc.*, the court ruled that if it were to dismiss the 7 defendants who filed FNC motions, the case as to the remaining 18 defendants would still have to tried in Madison County; thus, such relief defeats the purpose of the *forum non conveniens* rule, which is to "unburden" the Court with litigation that could take place in another forum.

E. New Case Law/Trends in Asbestos Actions

1. **Whether the manufacturer of an asbestos product owes a duty of care to other members of an employee's household who was exposed to asbestos**
This year, the California Supreme Court is set to hear *Kesner v. Superior Court (Pneumo Abex)*, 226 Cal.App.4th 251 (2014), and *Haver v. BNSF Railway*, 226 Cal.App.4th 1104 (2014), which came to different conclusions about whether an asbestos manufacturer owes a duty of care to members of an employee's household allegedly exposed to asbestos brought home on the employee's clothing. In *Kesner*, the Appellate Court found that a brake lining manufacturer owed a duty to the nephew of its employee for asbestos brought home on his uncle's clothing. In contrast, the Appellate Court in *Haver* found that a premises owner did not owe a duty of care to family members of one who was exposed to asbestos products working at a BNSF premises.

2. **Whether Workers' Compensation Exclusivity Statutes Bar Asbestos Claims**

The Illinois Supreme Court, in November of 2015, decided *Folta v. Ferro Engineering*, 2015 IL 118070 (Nov. 4, 2015) finding that an employee's common law tort action against his employer is barred by the exclusive remedy provisions of the Workers' Compensation Act and the Workers' Occupational Diseases Act even though no compensation is available under those acts due to statutory time limits on the employer's liability. In what has been seen as a victory to the defense bar, the Court held that it was the responsibility of the state legislature, not the courts, to modify the language of the Illinois Workers' Compensation Act and restored the exclusive remedy defense to Illinois employers of asbestos plaintiffs.

3. **Bare metal defense/third party liability – whether the manufacturer of a product is legally responsible for asbestos-containing products sold by third parties where it was foreseeable that the asbestos products would be used near or in conjunction with the manufacturer's product**

The New York Court of Appeals has an opportunity in two cases presently under review (*In Re New York City Asbestos Litigation* and *Dummitt v. Crane Co.*, 121 A.D.3d 230) to confirm that New York law is in harmony with the clear majority rule nationwide that a manufacturer of a given product is not legally responsible for asbestos-containing products made and sold by third parties simply because it may have been foreseeable that such materials would be used near or in conjunction with the manufacturer's product post-sale (the "bare metal defense"). In both of these cases, plaintiffs received significant awards against a valve manufacturer even though it did not make, supply or place into the stream of commerce any of the asbestos-containing products to which exposure was alleged. The Court is to determine whether these cases are to conform with the holding in the non-asbestos case of *Rastelli v. Goodyear Tire & Rubber Co.*, 591 N.E.2d 222 (N.Y. 1992), where a manufacturer is only liable for harm caused by an injurious defective product made or sold by a third-party when a manufacturer: (1) controlled the production of the injury-producing product, (2) derived a benefit from the sale of the injury-producing product, or (3) placed the injury-producing product in the stream of commerce.

F. State of the Asbestos Settlement Fund

1. **Congressional Bills in Response to Litigation:** Several states are instituting legislation or venue-specific case management

orders to address the lack of transparency in the disclosure of bankruptcy trust claims. For instance, in 2014, Wisconsin bill A.B. 19 was passed, requiring plaintiffs in asbestos actions to disclose whether they have filed a claim against any personal injury trust. In January of 2015, Texas introduced legislation called "Furthering Asbestos Claims Transparency Act (FACT) of 2015" that would require asbestos trusts in the U.S. to file quarterly reports about the payouts they make and personal information on those receiving them in a publicly accessible database. The bill passed out of committee in May of 2015 and is awaiting a full vote by the House of Representatives. Also in May of 2015, Judge Emilie Elias entered a case management order in Los Angeles County, California to be applied in all asbestos cases, requiring the disclosure of bankruptcy trust claims including all facts relating to alleged asbestos exposures. Lastly, in 2015, Illinois and Massachusetts senators introduced the "Reducing Exposure to Asbestos Database Act of 2015" which would establish a public database regarding the location and identity of asbestos and asbestos-containing products in the U.S.

2. **Litigation Against Plaintiffs' Firms for Fraud, Conspiracy and RICO:** In 2010, Garlock Sealing Technologies, a gasket and packing manufacturer, filed bankruptcy under Chapter 11, Section 524(g) in the United States District Court for the Western District of North Carolina seeking to limit its liability to current and future mesothelioma-related cases (*In Re Garlock Sealing Technologies, LLC*). Garlock contended that it was manipulated into overpaying in settlements with plaintiffs lawyers who withheld evidence that their clients were exposed to other manufacturers' products. Throughout the 2010 to 2013 time period, Judge George Hodges ordered discovery on 15 cases, held a hearing and concluded that plaintiffs' lawyers withheld evidence that their clients were exposed to asbestos products from other companies. He limited the total liability in mesothelioma-related lawsuits of Garlock to $125 million rather than awarding $1.25 billion sought by plaintiffs' lawyers.

II. Strategies To Defending and/or Resolving Asbestos Claims

A. Defense Arguments

Numerous defense arguments are utilized by the manufacturers and sellers of asbestos containing products, the majority of which must be presented through expert testimony. There is an overwhelming amount of scientific, medical, and industrial hygiene literature, articles and text addressing the various types of asbestos fibers; the voluminous asbestos products that are the subject of litigation; what the different

manufacturing industries knew (or should have known) about potential hazards of asbestos; and the frequency, proximity and duration of asbestos exposures that allegedly causes mesothelioma, asbestosis and lung cancer in those who work with or around asbestos containing products. Not surprisingly, given that asbestos litigation has been and continues to be the most prevalent mass torts litigation the United States has ever seen, the scientific literature as well as the numerous retained experts who take sides in the litigation are frequently at odds with one another.

Ultimately, in order to properly represent the manufacturer or seller of a product in an asbestos action, the liability and causation aspects of the case must be vigorously defended. With respect to liability, it is imperative that an industrial hygienist, epidemiologist, occupational medicine, or other expert with knowledge of the "state of the art" of a particular manufacturing industry offer opinion testimony that the defendant company did not know nor should it have known that its product was hazardous. Likewise, with respect to causation, an industrial hygienist will need to be able to opine that the alleged exposure to the asbestos product at issue did not increase the risk of the plaintiff developing an asbestos related disease. Additionally, it will be necessary to retain a medical expert, preferably a pathologist or pulmonologist, to opine that the alleged exposure to the asbestos product at issue did not cause the plaintiff's lung disease. The following arguments are the most prevalent defense theories.

Low Dose Exposure/Causation Defense Arguments

Every plaintiff in the country who files a products liability asbestos action contends that all asbestos exposure, no matter how low the dose of exposure, can cause lung disease. This argument is particularly utilized when the plaintiff develops mesothelioma. Plaintiffs generally contend that there is no safe level of asbestos exposure. They also tend to argue that it is the "cumulative" asbestos exposures of a plaintiff's working lifetime that cause lung disease, and that each and every exposure contributed to it. Accordingly, in order to counter these positions, products defendants must be able to present evidence in conjunction with expert opinion testimony demonstrating that the plaintiff's exposure to the asbestos product at issue was negligible or de minimis. Put another way, a products defendant must argue that the asbestos exposure was below background levels of asbestos in the ambient air. A certified industrial hygienist should be able to extrapolate from the testimony of the plaintiff (and/or plaintiff's co-workers if plaintiff is deceased) as well as any relevant documents pertaining to the plaintiff's occupation and/or the specific product regarding whether the frequency, duration and proximity of plaintiff's exposure to the asbestos product at issue increased his risk of developing a lung disease such as mesothelioma, asbestosis or cancer.

It is incumbent upon the defense attorney to press the plaintiff and/or plaintiff's key product identification witness for specifics regarding how often he used the product, worked around the product, how he used the product, how long he was around the product at a given time, where was he when he used the product (indoors or outdoors? within the breathing zone or several yards away?) and over what period of time during

his career he worked with or around the product. An industrial hygiene expert with significant knowledge of the industry and product at issue should be able to then determine whether the asbestos exposure at issue increased the plaintiff's risk of developing a lung disease. If the asbestos exposure on a time weighted average is below the level of asbestos in the ambient air, the expert should be able to opine that there was no increased risk of developing an asbestos induced disease. Likewise, an industrial hygiene expert should be able to evaluate the OSHA regulations, enforcement and practices and the threshold limit values and permissible exposure limits at various times to further determine whether an increased risk of developing a lung disease existed.

Chrysotile Defense in Mesothelioma Actions

Plaintiffs contend that all asbestos is the same. In doing so they ignore the lack of scientific evidence linking chrysotile asbestos to mesothelioma. They typically rely upon literature and studies involving chrysotile that is contaminated with amphibole asbestos fibers. However, products defendants may argue, through an expert (ie. a CIH/toxicologist and/or pathologist) that chrysotile dust is a weak human pleural carcinogen, particularly when the exposures were not heavy in frequency and duration. Products defendants can argue that chrysotile and amphibole asbestos fibers are different in shape and size (chrysotile is curly like spaghetti whereas amphibole is straight and arrow-like), chemical composition (chrysotile does not contain iron whereas amphibole does), and electrical charge, and their persistence in the lung is drastically different (chrysotile's half life is a matter of months whereas an amphibole's half life is 20 to 30 years).

If the product at issue was not specifically tested for its composition, experts will still likely be able to opine on the general characteristics of the product based on the available scientific literature (ie. if it is a textile product, for instance, there is a plethora of literature indicating that textiles are composed of chrystotile). Moreover, the vast majority of commercial asbestos products used chrysotile asbestos as opposed to amphiboles. Thus, in the event that the product at issue was made of chrysotile asbestos, products defendants can argue that they did not contribute to plaintiff's mesothelioma.

State of the Art Defenses/ No Duty to Warn

The state of the art defense focuses on the knowledge within a particular industry regarding whether an asbestos product in the industry was potentially hazardous, thereby requiring the manufacturer and/or seller of the product to either warn of its hazardous nature or stop selling it. A key aspect of this argument is that OSHA became effective in the early 1970s and for the first time asbestos products were regulated by the Federal government. OSHA's permissible exposure limit changed over the course of time, throughout the 1970s and into the early 1990s. Plaintiffs, of course, contend that everyone knew that asbestos was dangerous from the early 1900s, arguing that scientific literature started being published at that time, which any asbestos products defendant should have been aware of.

Products defendants should attempt to develop a theory, through the testimony of a state of the art expert, that it was not known nor would it be known to the manufacturer or seller of an asbestos product that it was hazardous. If, for example, the scientific literature shows that exposure to the product was below the applicable OSHA permissible exposure limits, a products defendant can argue that it was not required to warn of a hazard. Likewise, the lack of scientific literature *at the time of the alleged exposure* regarding the *particular product at issue* can be demonstrated to further defend a products defendant in a failure to warn action.

Product Identification Lacking

In many instances, the plaintiff will lack the requisite product identification to build a credible action against a product defendant. However, crafty plaintiff attorneys will coach their clients into identifying certain products and/or certain defendants at their depositions. In many jurisdictions, the mere mention of a defendant by name, without any substantiating evidence, will be sufficient for the plaintiff to withstand a summary judgment motion contending that plaintiff failed to identify the product defendant's specific product. Nonetheless, a plaintiff who has weak product identification against a product defendant can be exposed at trial. If the product ID is weak, the plaintiff's case is likewise severely weakened. Moreover, the majority of plaintiffs' attorneys generally do not want to proceed to trial against a defendant unless the product ID is sufficiently strong and believable.

B. Claims Resolution Strategies

Of course, notwithstanding the above defense arguments, the majority of asbestos claims resolve via settlement before trial. The litigation costs and expenses to defend an asbestos action through trial can be expensive, particularly when factoring in the retention of 2 or 3 experts to offer opinions during discovery and trial. Accordingly, there are a handful of tactical approaches that may be taken to economically resolve asbestos actions, which should be considered as an alternative to proceeding to trial.

To begin with, a products defendant that is repeatedly sued by the same plaintiffs' firm might consider resolving several cases via settlement in bulk early in the litigation process. This is an option if the plaintiffs' firm already knows everything about the defendant from prior litigation, has corporate representative depositions, corporate documents, prior court rulings, etc. Litigation may be redundant and costly on both sides. Hence, the desire to resolve some claims in bulk at a reasonable and responsible figure. However, it is always important to know who you are dealing with. Not all plaintiff firms are the same in the asbestos world. Some are lazy and have no real track record for pushing cases to verdict or even to the doorstep of trial. These types of lawyers may offer a "bargain" demand on cases in bulk. Sometimes, for business reasons, this might be a good approach (ie. the costs/expenses to defend the case to or through trial far exceeds the settlement amount).

Other plaintiff attorneys, on the other hand, have a history of taking asbestos cases to verdict. These attorneys may drive harder to push a case to trial, dig up everything there

is to know about a products defendant, and otherwise attempt to scare and bully a defendant into overpaying on a claim out of its fear of proceeding to verdict. It is important to note that paying more than the settlement value on a case to resolve a claim can potentially have dire consequences in that the defendant may find itself getting named in lawsuit after lawsuit. Overpaying on a claim sends a message to the plaintiffs' bar that the defendant does not want to defend itself through trial. The lesson here is that sometimes, in the right case, it is worth it to proceed to trial. At the very least, by putting up a fight the plaintiffs' bar will know that they cannot roll over such a defendant, and may not routinely name that defendant in lawsuits.

III. The Future of Handling Asbestos Claims

A. We will continue to see new mesothelioma/lung cancer/asbestosis claims

The answer is yes. Since the mid 2000s, there have been no signs of a slowdown with respect to asbestos product liability filings throughout the U.S. While the volume of individuals who have developed mesothelioma, lung cancer or asbestosis may have done down over the past 10 to 15 years, the plaintiffs' bar has been very successful with its marketing efforts in signing up plaintiffs for mass tort actions alleging that asbestos exposures caused their lung diseases. This trend is anticipated to continue for at least another decade. Moreover, the plaintiffs' bar has continued to extensively search for new and sometimes more peripherally involved manufacturers and sellers of asbestos containing products. The Internet has undoubtedly made their job easier in this regard. The so called "conspiracy of silence" manufacturers are largely bankrupt and out of business. At this stage, it is the second tier manufacturers and sellers who are now being targeted by plaintiffs in asbestos litigation.

B. The Effect of These New Claims

The effect of these new claims is that product defendants will have a choice: whether to fight these claims, which are becoming more and more tangential, or make an economic/business decision to quickly dispose of the claims. We are moving further away from the heyday/golden age of asbestos litigation, but the same products liability issues continue to be prevalent and the plaintiffs' bar is not quite ready to give up its golden goose. Accordingly, products defendants need to know how to resolve claims against them expediently and economically if possible and/or proceed to trial if necessary.