CLM CLAIMS & LITIGATION MANAGEMENT ALLIANCE™

ADVANCING ETHICS, COOPERATION AND EDUCATION

2014 CLM Annual Conference

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Boca Raton Resort
501 E. Camino Real
Boca Raton, FL 33432

Roundtable 3: Thursday, April 10, 2014 (3:30 pm – 4:30 pm)

ASBESTOS-LITIGATION TRENDS 2014

Snapshot of Trends in Asbestos Litigation[1]

- New asbestos claims have remained stable over the past five years. Asbestos claims peaked in 2004 and fell significantly until 2007, when they leveled off at the present rate. The number of new asbestos claims is just 20% of the 2001 level, a reflection of the move away from filings on behalf of unimpaired claimants.
- Average payments per resolved claim increased by 75% in 2011, following a 31% increase in 2010. The higher value of claims is likely a result of the shifting' disease mix toward malignant diseases discussed below.
- The number of resolved claims declined by 30% in 2011, following a similar decline in 2010, reaching the lowest level since 2001. This decrease may reflect the lower level of asbestos filings in the second half of the 2000s.
- Concentration of litigation is in a few jurisdictions including New York City; Philadelphia, Pennsylvania; Madison and Cook Counties, Illinois; Baltimore, Maryland; and Los Angeles and San Francisco, California.
- The property casualty insurance industry incurs approximately $2 billion in annual asbestos losses and pays out $2.5 billion each year. A.M. Best recently predicted that the ultimate amount of asbestos losses for the P&C industry will be $85 billion, a $10 billion increase over its previous estimate.

[1] NERA Economic Consulting Snapshot of Recent Trends in Asbestos Litigation:2013 Update 3 June 2013 http://www.nera.com/67_8120.htm

Bare Metal Defense

Background

- Started in California in early 2000's. (Cullen v. IHC – Carborundum Grinding Wheels).

- An emerging theory being promoted by some plaintiffs' counsel is that makers of non-defective products, such as pumps or valves, should be held liable for harms allegedly caused by asbestos-containing replacement internal gaskets or packing or replacement external flange gaskets manufactured or sold by third parties, or for asbestos-containing external thermal insulation manufactured and sold by third parties and attached post-sale, for example, by the United States Navy. This theory is attractive to plaintiffs' lawyers because most major manufacturers of asbestos-containing products have filed for bankruptcy, and the Navy enjoys sovereign immunity. As a substitute, plaintiffs seek to impose liability on solvent manufacturers for harms caused by products they never made or sold.

- As more traditional asbestos defendants filed for bankruptcy, plaintiffs sought to impose liability upon viable companies more peripheral to and more removed from the actual manufacture and sale of asbestos-containing products.

- The appropriate response has been the bare metal defense, which is soundly premised on the policy justifications for the imposition of strict products liability.

- BASIC PREMISE – One has no duty to warn of the potential dangers that may result from a user's exposure to asbestos fibers from working on or with its bare metal equipment where the manufacturer or seller of the bare metal equipment did not place the asbestos-containing materials to which plaintiff claims exposure into the stream of commerce.

Reasoning/Rationale

- Products liability law is a matter of public policy.

- It is a fundamental principle of products liability law that a plaintiff must prove, as an essential element of the case, that the defendant manufacturer actually made the particular products which caused the injury.

- The public policy justification for strict liability in tort is that parties in the chain of distribution of products that cause harm should be liable for the costs of the harm because they are in the best position to absorb the costs of liability into the cost of production, because it is fair to have such parties bear the cost of loss, and because the imposition of such costs on such parties will encourage those who manufacture or sell products to make those products safe.

- From Comment C to Restatement of Torts (Second), Section 402A – "On whatever theory, the justification for the strict liability has been said to be that the seller, by marketing his product for

use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it; that the public has the right to and does expect, in the case of products which it needs and for which it is forced to rely upon the seller, that reputable sellers will stand behind their goods; that public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained; and that the consumer of such products is entitled to the maximum of protection at the hands of someone, and the proper persons to afford it are those who market the products."

- To impose liability upon parties who did not manufacture, distribute, sell or supply the harmful product, who did not benefit from it, and who did cannot insure against the risks, is contrary to the basic theory of, and policies underlying, products liability law.

- A necessary prerequisite to the imposition of liability upon a product manufacturer or seller is the requirement that a plaintiff present sufficient proof that the particular defendant actually placed into the stream of commerce the specific toxic products (in this case, products containing asbestos) that allegedly caused the disease developed by plaintiff.

- The law does not impose upon one manufacturer/seller a duty to warn about the potential hazards inherent in products manufactured/sold by unrelated parties – even when it is foreseeable or even anticipated that the first manufacturer's product will be used in conjunction with the second manufacturer's defective, injury causing-product.

- An inference of defectiveness may not be drawn from the mere fact that someone was injured. Liability should be imposed only when the manufacturer is responsible for the defective condition.

- The governing law does not impose a duty of one product manufacturer to scrutinize another's product with respect to which the first manufacturer had no role in developing.

- The mere foreseeability of a risk of harm created by the concurrent use of two independently-developed products does not create or give rise to a duty upon one manufacturer to warn of dangers inherent in another manufacturer's product.

- The general rule under the common law is that a manufacturer does not have an obligation to warn of the dangers of another manufacturer's product. The defendant-manufacturers are not in the chain of distribution of asbestos-containing packing and gaskets that replaced the original packing and gaskets and thus fall within this general rule. Moreover, whether the manufacturers knew replacement parts would or might contain asbestos makes no difference.

- The harm in this case is a result of exposure to asbestos. Manufacturers who did not manufacture, sell, or otherwise distribute the replacement products containing asbestos to which a plaintiff claims he was exposed did not market the product causing the harm and could not treat the burden of accidental injury caused by asbestos in the replacement products as a cost of production against

which liability insurance could be obtained. Thus, the policies that support imposition of strict liability are inapplicable.

Leading Decisions – Majority Rule of No Liability

- Leading Case – 2012 decision of California Supreme Court in O'Neil v. Crane Co., 53 Cal. 4th 335, 266 P.3d 987 (Ca. 2012): "Recognizing plaintiffs' claims would represent an unprecedented expansion of strict products liability. We decline to do so. California law has long provided that manufacturers, distributors, and retailers have a duty to ensure the safety of their products, and will be held strictly liable for injuries caused by a defect in their products. Yet, we have never held that these responsibilities extend to preventing injuries caused by other products that might foreseeably be used in conjunction with a defendant's product….The broad rule plaintiffs urge would not further the purposes of strict liability. Nor would public policy be served by requiring manufacturers to warn about the dangerous propensities of products they do not design, make, or sell."

- "[T]he reach of strict liability is not limitless. We have never held that strict liability extends to harm from entirely distinct products that the consumer can be expected to use with, or in, the defendant's non-defective product. Instead, we have consistently adhered to the *Greenman* formulation requiring proof that the plaintiff suffered injury caused by a defect in the defendant's own product. [Citations.] Regardless of a defendant's position in the chain of distribution, "the basis for his liability remains that he has marketed or distributed a defective product."

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- "The foreseeability of harm, standing alone, is not a sufficient basis for imposing strict liability on the manufacturer of a non-defective product, or one whose arguably defective product does not actually cause harm."

- "The Court of Appeal's extension of [of the law] could easily lead to absurd results. It would require match manufacturers to warn about the dangers of igniting dynamite, for example. Moreover, as noted, California law does not impose a duty to warn about dangers arising entirely from another manufacturer's product, even if it is foreseeable that the products will be used together. Were it otherwise, manufacturers of the saws used to cut insulation would become the next targets of asbestos lawsuits.

Current Battleground – New York

- There is currently a split of authority between New York state and federal courts, with state courts finding that little more than foreseeability can create liability for bare metal manufacturer, while federal courts follow the majority rule of no liability.

- Leading federal court decision -- *Surre v. Foster Wheeler LLC*, 831 F. Supp. 2d 797, 802 (S.D.N.Y. 2011). Closely mirrors reasoning and holding of O'Neil.

- Leading state court decisions -- *Berkowitz v. A.C. & S., Inc., 733 N.Y.S.2d 410, 411-12 (N.Y. App. Div. 1st Dept. 2001); Sawyer v. A.C. & S., Inc., No. 111152/99, 2011 WL 3764074*, at *3 (N.Y. Sup. Ct. New York County June 24, 2011); *Defazio v. A.W. Chesterton, No. 127988/02, 2011 WL 3667717*, at *3 (N.Y. Sup. Ct. New York County Aug. 12, 2011); *Kersten v. A.O. Smith Water Prods. Co., No. 190129/10, 2011 WL 1096996* (N.Y. Sup. Ct. New York County Mar. 14, 2011); *In re* New York City Asbestos Litig. (Ronald Dummitt v. A.W. Chesterton et al.), *No. 1090196/10, 2012 WL 3642303* (N.Y. Sup. Ct. New York County Aug. 20, 2012).

- Criticism of *Berkowitz*: The position advocated by plaintiffs is adopted by very few courts. *Berkowitz v. A.C.&S., Inc.*, 733 N.Y.S.2d 410 (1st Dept. 2001), the main decision cited by plaintiffs, is a one-page New York appellate court decision which was a denial of a summary judgment motion that barely discusses the facts, much less the law, and does not address whether products liability or negligence claims are at issue. Moreover, the rule of law for which plaintiffs say this case stands is not so clear.

- Potential recent favorable ruling rejecting foreseeability as a basis for liability -- In re Eighth Judicial Dist. Asbestos Litig. (Drabczyk v. Fisher Controls Int'l, LLC), *938 N.Y.S.2d 715, 802-03 (N.Y. App. Div. 4th Dept. 2012).*

Gray Areas Where Liability May Exist:

- Negligence vs. Strict Liability – Although most courts have applied the bare-metal defense to dismiss both strict liability and negligence claims, it is not entirely clear whether the policies of the bare metal defense warrant dismissal of negligence claims To date, courts have not distinguished between negligence and strict liability.

- Require or Recommend Asbestos-Containing Products – If a plaintiff proves that a defendant (typically boiler manufacturers) required or recommended the use of asbestos-containing insulation with its products, the Bare Metal Defense will normally not apply, and the defendant will normally be subject to strict liability for failing to warn of the hazards associated with asbestos exposure.

Lung Cancer Claims-The Shift in the Disease Mix

Judicial and legislative reform has resulted in the plaintiff's bar to shifting from large number of unimpaired plaintiff's and focusing on the more lucrative malignancy claims traditionally mesothelioma. However, the number of mesothelioma cases diagnosed per year is decreasing according to the CDC. [2] While lung cancer claims have always taken a back seat to mesothelioma claims. They have never been as enticing to the plaintiffs' bar as mesothelioma claims. Despite the synergy argument, they present more complex causation issues for plaintiffs, and typically resolve for less money than mesothelioma claims. Nevertheless plaintiffs' firms have been aggressive in filing lung cancer claims. All jurisdictions have already seen an increase. In New York City, there were only 35 lung cancer cases in the 2008 *in extremis* cluster; there are currently 106 lung cancer cases on the 2013 *in extremis* cluster.[3]

From a strategic point of view lung cancer claims because they are a malignancy are given *in extremis* status by the courts and given priority on the trial calendar which keeps the plaintiff's bar's *cash flow* stable. It is estimated that there will be 224,210 cases of lung cancer diagnosed in the United States in 2014[4] this is an amazing number of potential clients.

Asbestos Bankruptcy Trusts-Moving Towards Transparency?

To date, over 100 companies with asbestos-related liabilities have filed bankruptcy, allowing these companies to channel their asbestos liabilities into trusts and insulate themselves from tort claims in perpetuity.[5] Accordingng to a 2011 report by the U.S. Government Accountability Office, "the number of asbestos personal injury trusts increased from 16 trusts with a combined total of $4.2 billion in assets in 2000 to 60 with a combined total of over $36.8 billion in assets in 2011.[6]

Trust Submissions Abuses Revealed

In *Kananian* v. *Lorillard Tobacco* Co.[7] where Cleveland Judge Harry Hanna barred a prominent California asbestos plaintiffs' firm from his court after he found that the firm and one of its partners failed to abide by the rules of the court proscribing dishonesty, fraud, deceit, and misrepresentation.[8] An

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[2] CDC. Malignant Mesothelioma Mortality-United *States.* 1999- 2005, Morbidity, Mortality Wkly. Rep., 58{15); 393-396 {Apr. 24, 2009). According to the National Cancer Institute. the incidence of mesothelioma in the U.S. fell 22% *between* 1992 and 2009, to 0.96 new cases per 100,000 from 1.23.

[3] New York City Asbestos Litigation Website In Extremis Trial Clusters http://www.nycal.net/in_extremis.htm

[4] Siegel, R., Ma, J., Zou, Z. and Jemal, A. (2014), Cancer statistics, 2014. CA: A Cancer Journal for Clinicians. doi: 10.3322/caac.21208

[5] *See* 11 U.S.C. § 524(g); Lloyd Dixon et al., *Asbestos Bankruptcy Trusts: An Ove1View of Trust Structure and Activity with Detailed Reports on the Largest Trusts* 25(Rand Corp. 201O); Plevin, *supra* (Chart 1); New York City Asbestos Litigation, *Bankruptcies,* http:// www.nycal.net/bankruptcies.htm(2013)

[6] U.S. Government Accountability Office, GA0-11-819, *Asbestos Injury Compensation: The Role and Administration of Asbestos Trusts 3* [Sept. 2011); *see also* Lloyd Dixon & Geoffrey McGovern, *Asbestos Bankruptcy Trusts and Tort Compensation* [Rand Corp. 2011); Marc C. Scarce/la & Peter R. Kelso, *Asbestos Bankruptcy Trusts: A 2012 OveNiew of Trust Assets, Compensation* & *Governance,* 11:11 Mea/ey's Asbestos Bankr. Rep. 1 (June 2012).

[7] No. CV-442750 (Ohio Ct. Com. Pl. Cuyahoga County Jan. 17, 2007

[8] *See Ohio Judge Bars Calif. Firm from His Court,* Nat'I l.J., Jan. 22, 2007, at 3; Thomas J. Sheeran, *Ohio Judge Bans Calif. Lawyer in Asbestos Lawsuit,* Cincinnati Post, Feb. 20, 2007, at A3.

Ohio Court of Appeals and the Ohio Supreme Court let Judge Hanna's ruling stand.[9] Judge Hanna said later, "In my 45 years of practicing law, I never expected to see lawyers lie like this."[10] Judge Hanna added, "[It] was lies upon lies upon lies."[11] Judge Hanna's ruling in *Kananian* received national attention for exposing "one of the darker corners of tort abuse" in asbestos litigation: inconsistencies between allegations made in open court and those submitted to bankruptcy trusts to pay asbestos-related claims.[12] Emails and other documents from the plaintiff's lawyers also showed that their client had accepted monies from entities to which he was not exposed, and one settlement trust form was "completely fabricated."[13] The Wall Street Journal editorialized that Judge Hanna's opinion should be "required reading for other judges" to assist in providing "more scrutiny of 'double dipping' and the rampant fraud inherent in asbestos trusts."[14]

In a New Jersey case, *Barnes and Crisafi v. Georgia Pacific,*[15] plaintiff's counsel disclosed the existence of bankruptcy trust claims submissions during the pre-trial conference. The disclosure came about only after defense counsel independently contacted a representative of the Johns-. Manville Trust who confirmed that a claim had been made on behalf of one of the plaintiffs. Counsel for plaintiff subsequently disclosed the existence of other trust filings, and attempted to explain the lack of earlier disclosure on the grounds that the filings were "deferred claims" intended preserve the trust statute of limitations and seek compensation at a later time, and were filed by another law firm.[16] In response, the court stated that no such distinction in the type of trust claims filed was expressed in the court's discovery order and that the plaintiffs clearly had an obligation to identify and produce this information. The court admonished plaintiff's counsel for violating its order, saying, "You cannot be blind, deaf and dumb," and reminded counsel, "You're an officer of The Court."[17] The court went on to repeatedly state that this failure to disclose the trust submissions constituted "a major problem," questioning: "How can I try this case now?"[18] After discussing with the parties how this lack of disclosure prejudiced the defendants, the court decided to postpone the trial that was scheduled to begin the following week.

Fraudulent Trust Fund Filings

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[9] *See Kananian v Lorillard Tobacco Co.,* No. 89448 (Ohio Ct. App. Feb. 21, 2007) (dismissing appeal as *moot,* sua sponte), *review denied,* 878 N.E.2d 34 [0hio 2007): *see also* Behrens, *supra,* 28 Rev. Litig. at 550-52.

[10] James F. McCarty. *Judge Becomes National Legal Star, Bars Firm from Court Over Deceit, Cleveland Plain Dealer,* Jan. 25, 2007, at 81.

[11] Id

[12] Editorial, *Cuyahoga Comeuppance,* Wall St. J., Jan. 22, 2007, at A14; see also Kimberly A. Strassel, Opinion, *Trusts Busted,* Wall St. J., Dec. 5, 2006, at A 18 ("[One] law firm filed a claim to one trust, saying Kananian had worked in a World War II shipyard and was exposed to insulation containing asbestos. It also filed a claim to another trust saying he had been a shipyard welder. A third claim, to another trust, said he'd unloaded asbestos ships in Japan. And a fourth claim said that he'd worked with 'tools of asbestos' before the war. Meanwhile, a second la\v firm, Brayton Purcell, submitted two more claims to two further trusts, with still different stories.. .[Brayton Purcell then] sued Lorillard Tobacco, this time claiming its client had become sick from smoking Kent cigarettes, whose filters contained asbestos for several years in the 1950s.").

[13] McCarty, *Judge Becomes National Legal Star, supra.*

[14] *Cuyahoga Comeuppance, supra,* at A14.

[15] MID-1316-09 (NJ Super Ct. Middlesex County June 12, 2012) (Pre-Trial Conference Transcript)

[16] See id at 128-129
[17] See id at 129-130
[18] See id at 133-134

The *Wall Street Journal* recently reviewed trust claims and court cases of roughly 850,000 persons who filed claims against the Manville Trust from the late 1980s until as recently as 2012.[19] "The analysis found numerous apparent anomalies: More than 2,000 applicants to the Manville Trust said they were exposed to asbestos working in industrial jobs before they were 12 years old."[20] "Hundreds of others claimed to have the most-severe form of asbestos- related cancer in paperwork filed to Manville but said they had lesser cancers to other trusts or in court cases.'[21] The study also identified a trust claim that was filed against the Manville Trust by an individual who did not exist.[22]

Is Legislative Help on The Way?

Furthering Asbestos Claim Transparency (FACT) Act of 2013 - Amends federal bankruptcy law concerning a trust formed under a reorganization plan following the discharge in bankruptcy of a debtor corporation in order to assume the debtor's liability with respect to claims seeking recovery for personal injury, wrongful death, or property damage allegedly caused by the presence of, or exposure to asbestos or asbestos-containing products.

Requires such a trust to file with the bankruptcy court quarterly reports, available on the public docket, which describe each demand a trust has received from a claimant and the basis for any payment made to that claimant (excluding any confidential medical record or claimant's full Social Security number).

Requires such reports, upon written request, and subject to payment (demanded at the option of the trust) for any reasonable cost incurred by it, to provide any information related to payment from, and demands for payment from, the trust to any party to any action in law or equity concerning liability for asbestos exposure.

[19] *See* Dionne Searcey & Rob Barry, *As Asbestos Claims Rise, So Do Worries About Fraud,* Wall St. J., Mar. 11, 2013, at Al, A14.
[20] Id at A14
[21] Id
[22] Id at A14