

[Alerts and Updates]

Illinois Supreme Court Overturns *Lipke* Exclusionary Rule in *Nolan v. Weil-McLain*

April 17, 2009

On April 16, 2009, the Illinois Supreme Court in the case of *Nolan v. Weil-McLain* gave back to asbestos defendants a sword in the causation battle by overturning the *Lipke* exclusionary rule. The *Lipke* case and its progeny had held that evidence of exposures to other asbestos-containing products was always irrelevant when actual cause was being disputed. The court's decision in *Nolan* levels the playing field between plaintiffs and defendants by allowing a defendant in an asbestos case to present evidence of a plaintiff's other asbestos exposures to the jury in support of its sole proximate cause defense. Now, an asbestos defendant in Illinois can effectively argue its causation defense—that its products were not the proximate cause of a plaintiff's injury—through presenting the totality of a plaintiff's asbestos exposures to the jury.

Prior to this ruling, defendants were precluded from presenting any evidence that a plaintiff was exposed to the asbestos-containing products of nonparties, *i.e.*, defendants who had settled or were dismissed from the case. The Illinois Supreme Court held that lower courts had misread and overextended the *Lipke* exclusionary rule by excluding all evidence of a plaintiff's other asbestos exposures from trial, which effectively created a "presumption of liability" and deprived the jury of information essential to a causation determination in asbestos cases. Not allowing other exposure evidence, the court held, "improperly removes" the question of proximate causation from the jury.

In *Nolan*, the plaintiff, the Estate of Clarence Nolan, claimed that the decedent was exposed to asbestos through the installing, repairing and removing of defendant Weil-McLain's boilers. Eleven other defendants, originally in the lawsuit, either settled or were dismissed prior to trial. Weil-McLain sought to present other exposure evidence in support of its argument that the sole proximate cause of the decedent's death was exposure to the nonparties' asbestos-containing products. The trial court granted the plaintiff's motion in limine to bar all evidence of the decedent's exposure to asbestos-containing products of nonparties under the *Lipke* rule. The only information that was supplied to the jury was that the decedent had filed a lawsuit against defendants other than Weil-McLain in 1988. The jury returned a verdict in favor of the plaintiff in the amount of \$2,368,000, which was offset by other defendants' settlement amounts and reduced to \$1,222,500. The appellate court affirmed the trial court's decision to exclude the other exposure evidence. The Supreme Court of Illinois reversed the appellate and trial courts' decisions and remanded the case for a new trial.

Further, the court clarified the *Thacker* test, noting that "the ultimate *burden of proof on the element of causation*" remains with the plaintiff. A presumption of legal causation did not occur simply by the plaintiff presenting evidence of "frequency, regularity and proximity." The court stated that lower courts have "erroneously concluded that *Thacker* stands for the proposition that once a plaintiff meets the frequency, regularity and proximity test, he or she thereby establishes *legal causation*." Rather, the court explained that the *Thacker* test determines whether the plaintiff has presented enough evidence to establish cause in fact and to subsequently shift the burden of production to the defendant. The court reiterated that *Thacker* was never intended to relieve asbestos plaintiffs from the same burden of proof as to causation carried by other tort plaintiffs.

The *Nolan* decision effectively returns to Illinois asbestos defendants the ability to pursue the sole proximate cause defense. Now, the jury will have the opportunity to hear the full scope of the plaintiff's asbestos exposures in making its determination of causation.

For Further Information

If you have any questions about this Alert or would like more information, please contact Beatrice O'Donnell, Sharon L. Caffrey, Karen Shichman Crawford, any other member of the Products Liability and Toxic Torts Practice Group or the attorney in the firm with whom you are regularly in contact.
