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STEMMING THE TIDE OF TRACE BENZENE CLAIMS

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Certain plaintiffs' attorneys have been testing the legal waters by increasing their filing of "trace benzene" claims alleging that exposure caused their clients' cancer. Potential defendants in these actions include chemical manufacturers and distributors, retailers, and raw material suppliers. Given this imposing threat, what can defendant companies, their insurance carriers and counsel do to defend against and stem the tide of trace benzene claims? Accomplishing this result requires knowledgeable defense counsel skillfully using case management and technical expertise to minimize exposure and litigation expense.

History of Benzene

In 1986, the Environmental Protection Agency classified benzene as a human carcinogen and thereafter, it was banned for use as a solvent in the United States. However, benzene is still present in smaller quantities as a component in certain chemicals.

Benzene is a colorless, flammable liquid that occurs naturally in petroleum and is also produced through human activity. Historically, benzene has been used as a solvent and was contained in paints, adhesives and thinners, in addition to being used in a variety of industrial applications, including the manufacture of rubber products, lubricants, plastics, resins and pesticides.

Occupational studies of workers exposed to benzene have shown that long-term exposure to high levels may cause acute myelogenous leukemia ("AML"), a cancer of the bone marrow and blood. Once benzene was classified as a human carcinogen, numerous lawsuits arose concerning workers exposed to benzene who subsequently developed leukemia and other cancers. Industries that had used benzene as a solvent not only ceased using it in its pure form as mandated by law, but over the years, in light of both safety concerns and rising litigation costs, also curtailed their use of other products containing higher levels of benzene as a component. As a result, legal claims relating to exposure to "pure" benzene or products containing higher levels of benzene have diminished in recent years.

While benzene use has significantly decreased over the past two decades, the incidence of leukemia and other cancers has continued to rise. According to the Leukemia & Lymphoma Society, 44,240 new cases of leukemia will be diagnosed in the United States in 2007, over 30% of which will be classified as AML. In addition, 60,000 new cases of non-Hodgkin's lymphoma

("NHL"), a cancer of the white blood cells, were diagnosed in the United States in 2006, an 82% increase from 25 years ago.

"Trace benzene" typically refers to a product or chemical whose benzene content is less than .1%. There are a number of commonly used industrial chemicals that may contain trace levels of benzene. These include organic solvents, such as xylene, toluene, petroleum distillates, glycol ethers, TCE, PCE, and vinyl chloride. Some pesticides also contain very small quantities of benzene. The categories of workers who utilize these products include printers, cosmetic employees, farmers, gardeners, mechanics, chemical workers, pesticide workers, and construction trades.

Defense Tactics

Initially, defendants are best served by posturing the case so that the foundational questions of product identification and exposure can be efficiently answered as to each defendant. To avoid the lengthy and expensive discovery necessary in this type of case, a number of California courts have approved case management orders ("CMOs") submitted and negotiated by counsel, that require plaintiffs to respond to detailed fact investigation and exposure sheets prior to requiring defendants to respond to any written discovery. These fact sheets place the burden on plaintiffs to identify with specificity the products at issue for each defendant and the method and means of exposure by plaintiff to those products, including the production of any documents supporting plaintiffs' claims. Other CMOs order discovery to occur in phases, so that written discovery and depositions are initially limited to the questions of product identification and exposure. This allows those defendants that were named but are able to prove that they do not belong in the lawsuit to be dismissed prior to having to engage in substantial discovery (including the retention of experts) not relevant to their situation. Even when initial discovery confirms product identification and exposure, those defendants who are peripheral or not recognized targets may choose to negotiate smaller settlements and extricate themselves from the action in a cost-efficient manner.

To prevail in any toxic tort action, plaintiffs must not only prove product identification and exposure, but must also demonstrate both general and specific causation. General causation is defined as the ability of a particular substance to cause a disease, while specific causation asks whether the substance caused the disease in a specific case. The plaintiffs' experts refer to certain studies they claim support the conclusion that exposure to products with low levels of benzene can cause these diseases. Many of the scientific studies relied upon by plaintiffs in trace benzene matters, however, can be critiqued as not containing reliable data or conclusions.

Case control studies, where individuals diagnosed with a disease are subsequently interviewed in order to determine their exposures, are typically unreliable. Case control studies are often the subject of recall bias, where subjects tend to greatly exaggerate their exposures because they have already been diagnosed with the disease. In addition, studies relied upon by plaintiffs often fail to show a strong dose-response relationship, lack statistical significance, and may be deficient in identifying specific chemicals or injuries at issue in a given case.

Defendants can develop strategies that will allow them to challenge plaintiffs' causation theories in advance of trial. This can be accomplished via provisions in a CMO that provide for

mutual early expert designations, expedited summary judgment motions, and a pretrial hearing that challenges the admissibility of plaintiffs' medical causation experts. In California, *Evidence Code* Section 402 authorizes such a pretrial hearing, and the experts' opinions may be excluded under *Evidence Code* Sections 801 through 803 as not sufficiently supported by the scientific literature. Over the past few years, defendants in several California toxic tort actions have successfully excluded the causation testimony of plaintiffs' medical causation experts by utilizing the aforementioned pretrial procedures.

Plaintiffs' attorneys are always looking for the next "big thing". Trace benzene litigation presents complex issues and is expensive both to prosecute and defend. As a result, only those plaintiffs' firms with sufficient resources and knowledge concerning the science are filing these claims in increasing numbers. In order to successfully defend against these claims and discourage continued filings, defendants should seek to implement case management procedures that will streamline discovery and set the stage for the pretrial challenge of plaintiffs' causation experts.

If you would like more information on this subject, please contact Deidre Cohen Katz at dkatz@wfbm.com or any WFB&M attorney with whom you have an existing relationship.