

RECENT TRENDS IN ASBESTOS LITIGATION

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Almost 40 years after the first asbestos personal injury lawsuit was filed, asbestos litigation continues apace. The largest mass tort in U.S. history is showing no signs of slowing down — instead the litigation continues to morph, finding new types of plaintiffs and new categories of defendants. While the number of claims against manufacturers that formerly used asbestos material in their products is stabilizing, many limitations on existing trust funds and new bankruptcy filings have induced plaintiffs to target the “smaller players” and peripheral defendants. The asbestos litigation landscape is no longer dominated by asbestos-related pulmonary disease; rather, malignancies are gaining ground. Diagnoses of mesothelioma are at an all time high and, by some accounts, are not predicted to return to background levels until 2055.¹ In addition, asbestos-related lung cancer cases are beginning to inundate the courts. As we near the end of 2012, a review of the most recent statistics and trends may forecast what lies ahead for those companies (and attorneys) entrenched in asbestos litigation.

1. Bertram Price and Adam Ware, *Mesothelioma Trends in the United States: An Update Based on Surveillance, Epidemiology, and End Results Program Data for 1973 through 2003*, *Am. J. of Epidemiol* 2004; 159:107-112
2. This figure was calculated using the total payments divided by both settled and dismissed claims. *Asbestos Payments per Resolved Claim Increased 75% in the Past Year — Is This Increase as Dramatic as it Sounds?* NERA Economic Consulting, 1 Aug. 2012. Available at http://www.nera.com/67_7813.htm (last visited 10/02/2012).
3. *Projected Excess Deaths from All Asbestos-Related Cancers in Selected Occupations and Industries*, United States, 1965-2029, Based on Study by Nicholson et al. (1982); and Ries LAG, Melbert D, Krapcho M, Mariotto A, Miller BA, Feuer EJ, Clegg L, Horner MJ, Howlader N, Eisner MP, Reichman M, Edwards BK (eds). *SEER Cancer Statistics Review, 1975-2004*, National Cancer Institute. Bethesda, MD, http://seer.cancer.gov/csr/1975_2004/, based on November 2006 SEER data submission (last visited 10/12/2012).
4. American Lung Association Fact Sheet, <http://www.lung.org/lung-disease/lung-cancer/resources/facts-figures/lung-cancer-fact-sheet.html> (last visited 10/2/2012).

National Trends Driving Asbestos Litigation

A recent annual report from NERA Economic Consulting has calculated pertinent asbestos litigation statistics for 2011. According to NERA, 2011 saw a 75 percent increase in average dollars per resolved claims from 2010.² In comparison, the rate of increase from 2009 to 2010 was only 31 percent. This 75 percent increase places the average dollars paid per resolved claim at a level almost three times the 2001 level, and almost twice the historical peak in 2004. According to NERA, the 75 percent increase is not due to a significant upward trend in asbestos liabilities, but rather a result of a change in the proportion of types of injuries claimed — meaning there were more malignancies than non-malignancies being resolved in 2011. NERA found that despite the 75 percent increase in payment per resolved claims, there was no similar dramatic increase in claim filings. In fact, filings have stabilized over the last five years; there are approximately 52,000 new cases filed yearly.

The rates of dismissed and resolved claims decreased in 2011. 2011 marked the third consecutive year that dismissal rates have fallen; there was a five percent decline from 2010. The average number of resolved claims decreased by 30 percent. Since most claims typically are not resolved the year that they are filed, the resolved claims in 2011 largely reflect claims filed in years prior. According to NERA, the decline in dismissals is likely driven by tort reforms, increased scrutiny of non-malignant claims by courts and bankruptcy trusts, and because companies have made progress in clearing out their backlogs of non-malignant claims.

Based upon NERA's findings, we can conclude that the bulk of asbestos litigation will continue to be on malignant claims and they can be anticipated to maintain at current levels. Projection models forecast that anywhere from 2,500 to 9,300 cases of mesothelioma will be diagnosed each year over the next 20 plus years.³ It is estimated that 226,160 new cases of lung cancer will be diagnosed in 2012.⁴ An increasing percentage of these lung cancer cases are finding their way into the court system and threaten to present a robust portion of future litigation.

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Lung Cancer Claims

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,⁵ they present more difficult causation issues (especially in smoking cases) for plaintiffs, and typically resolve for less money than mesothelioma claims. Despite these hurdles, more aggressive plaintiffs' firms (sometimes new to the field) have begun to usher in a new era of lung cancer claims. Jurisdictions have already started to see an increase. In New York City, there were only 35 lung cancer cases in the 2008 *in extremis* cluster; there are currently 95 lung cancer cases on the 2012 *in extremis* cluster. In Madison County, Illinois, there were 89 lung cancer cases filed in July 2012 and in August there were 108 lung cancer claims. This increase is being felt nationally.

To combat the expected influx of lung cancer cases, defendants must aggressively defend these claims with science and proofs. Even some plaintiffs' attorneys concede there is little clinical difference between lung cancer caused by smoking, radon or asbestos.⁶ Fortunately for the defense of these cases, significant advances have been made in genetic tissue testing that support a more refined causation analysis, including one that distinguishes smoking from non-smoking lung cancers. Evaluation of the appropriateness of these diagnostic evaluations is important to both the successful defense of these claims and deterrence of future claims.

In states that allow for contributory negligence, a strong argument to proportion fault on a plaintiff must be presented. For example in *Gomez v. AC&S Inc., et al.*, JVR No. 412468, 2003 WL 23522208 (N.Y. Sup., N.Y. Co., July 2003), the plaintiff, a 57-year-old male welder, was found to be 25 percent contributorily negligent for his lung can-

5. The synergy argument asserts that the combination of smoking and asbestos exposure acts in synergy to multiply the risk of developing lung cancer.

6. *Asbestos and Lung Cancer*, Asbestos.com, <http://www.asbestos.com/cancer/lung-cancer/asbestos.php> (last visited 10/3/2012).

7. 16 states have decisions addressing the issue of secondary exposure. Illinois, New Jersey, Louisiana, Tennessee, California, and Washington permit secondary exposure claims, while Delaware, Ohio, Kansas, Iowa, Kentucky, Michigan, Texas, New York, Georgia, and Maryland do not.

cer that resulted from exposure from both smoking and asbestos contained in the welding rods. A plaintiff's smoking history is material to the outcome of these claims.

Leading Jurisdictions

New York, Philadelphia, Madison County, and California have experienced some recent events of note that may reshape the coming years of asbestos litigation. Madison County, which hosts 40 percent of all asbestos cases filed nationally, recently underwent changes to their trial docket. The changes have made it easier for more plaintiffs' firms to file cases, and, as may be expected, more cases have ensued, including the rise in lung cancer cases. Under the new trial docket system, there no longer will be a pre-assignment of trial settings; the standard jury trial week calendar will be used and cases will be set by motion on a case-by-case basis. Of note, the Illinois Supreme Court recently took up the issue of secondary exposure in *Simpkins v. CSX Transportation Inc.*, 2012 WL 966168 (Ill. Mar. 22, 2012), but the Court effectively deferred on the issue. The Court did not address the fundamental issue presented — whether a duty to warn a secondarily exposed plaintiff exists in Illinois — instead noting that the plaintiff's complaint was insufficient to establish that a railroad owed a duty of care to a wife and remanding the case to allow leave for the wife to amend her complaint.⁷ The lower court effectively stated that there was a duty.

Like Madison County, New York is also experiencing an increase in malignancy filings. Of interest, Judge Heitler, the administrative judge of New York City's Asbestos Litigation, recently indicated in a panel discussion that consideration ought to be given to permitting parties access to bankruptcy trust applications and payouts. It may be that the timing is ripe (should the situation present itself) for a motion to compel the amounts and terms of settlement agreements. Indications are that the judge may rule in a defendant's favor.

Also of note, in a recent New York decision, *In the Matter of NYC Asbestos Litigation, Dummitt v. A.W. Chesteron, et al.*, 36 Misc.3d 1234 (A), 2012 NY Slip Op 51597(U) (Sup Ct N.Y. Co. Aug. 20, 2012), Judge Madden reduced a \$32 million verdict awarded to plaintiff for 27 months of past pain (and six months of future pain and suffering) to \$8 million. In reducing the \$32 million verdict, Judge Madden noted “[r]ecent decisions which address the issue of the amount of damages where plaintiffs suffered from

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mesothelioma have sustained awards of \$3.5 million,⁸ \$4.5 million,⁹ and \$20 million.¹⁰ In two decisions issued in December 2011, where plaintiffs had developed lung cancer from exposure to asbestos, the trial court sustained awards of \$8 million¹¹ and \$6 million.¹² The *Dummitt* case is also significant because Judge Madden refused to reverse the finding that the defendant had a duty to warn of the dangers associated with the use of replacement asbestos components with its valves that it neither manufactured nor supplied. Judge Madden also rejected the defendant's argument that the government contractor defense shielded it from liability.

2012 and 2013 will be defining years for Philadelphia and New Jersey asbestos litigation. Both states recently had new administrative asbestos judges appointed. In Philadelphia, Judge New was recently appointed the administrative judge for asbestos litigation. His appointment will be effective at the end of this year. Judge New is an experienced and respected member of the Philadelphia Court of Common Pleas, having served on the bench since 1990. He is a former Assistant District Attorney and previously was in private practice focusing on criminal defense and personal injury.

In addition to a new judge, Philadelphia adopted new transitional working rules in an effort to manage a growing mass tort inventory. Under these new rules, reverse bifurcation will no longer be permitted, *forum non-conveniens* motions will be granted more freely, mediation will be encouraged, and proof will be required to support a request to expedite a case. Moving forward, cases will be consolidated in groups of 8–10, but no more than three will go to trial together. Depositions taken outside of Pennsylvania will continue to be permitted, however video conferencing will have to be paid for and provided by the party requesting the out-of-state deposition.

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8. *Penn v. Amchem Products*, 85 A.D.3d 475, 925 N.Y.S.2d 28 (1st Dep't 2011).
 9. *In re New York Asbestos Litigation (Marshall)*, 28 A.D.3d 255, 812 N.Y.S.2d 514 (1st Dep't 2006).
 10. *In re New York City Asbestos Litigation (D'Ulisse)*, 16 Misc.3d 945, 842 N.Y.S.2d 333 (Sup Ct N.Y. Co. July 10, 2007).
 11. *In re New York City Asbestos Litigation (McCarthy)*, Index Number 100490/99 (Sup Ct N.Y. Co. June 21, 2011).
 12. *In re New York City Asbestos Litigation (Koczur)*, Index Number 122340/99 (Sup Ct N.Y. Co. 2011).

Of note, in *Betz v. Pneumo Abex, LLC, et. al.*, 44 A.3d 27, 56 (Pa. 2012), the Pennsylvania Supreme Court rejected expert opinion testimony that “any exposure” is a substantial contributing factor to causing asbestos-related disease. The Court unanimously found that plaintiffs cannot present opinion testimony that “any exposure” caused or contributed to causing plaintiff's disease in an asbestos case involving friction exposures, *i.e.*, brakes and clutches, unless that opinion is adequately supported by competent exposure evidence. The May 23, 2012, ruling in *Betz* overturns the *en banc* decision of the state Superior Court, which the Pennsylvania Supreme Court found to be based on an “unduly cramped perspective” of the permissible scope of expert testimony. Also of significance, in *Daley v. A.W. Chesterton, et. al.*, 37 A.3d 1175 (Pa. 2012), the Pennsylvania Supreme Court held that the “two disease” or “separate disease” rule applied to a mesothelioma case in which the plaintiff had previously sued and recovered for asbestos-related lung cancer over a decade earlier. The separate disease rule, as adopted in Pennsylvania, allows a plaintiff to file an action for a malignant asbestos-related disease, even if he previously filed an action for a different malignant asbestos-related disease, provided as long as the second or subsequent action is based on a separate and distinct disease which was not known to plaintiff at the time of his first action, and is filed within the applicable statute of limitations period.

New Jersey's new administrative asbestos judge, the Honorable Vincent LeBlon, inherited the asbestos docket from Judge Ann McCormick on September 1, 2012. Judge LeBlon has a reputation of being fair, smart and well-prepared. He is 57-years-old and was initially appointed to the bench in 1997, thereafter reappointed in March 2004. He served in the Criminal Division and Family Division for several years before being transferred to the Civil Division 10 years ago. Many in the defense bar consider it likely that this will be a positive change.

California courts have been kind to defendants lately. Whether this is the beginning of a broader trend of leveling the playing field between defendants and plaintiffs is yet to be seen. In *O'Neil v. Crane*, 53 Cal. 4th 335, 351, 266 P.3d 987, 997 (2012) the Supreme Court of California put an end to inconsistent rulings in the trial and appellate courts by rejecting the theory that a manufacturer can be liable for injuries caused by asbestos replacement component parts they neither manufactured nor supplied. This decision will likely cause an increased focus on replacement

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part manufacturers, but limits litigation against manufacturers. Following *O'Neil*, the California Court of Appeals for the Second District, Division Two, affirmed summary judgment of a brake-grinding manufacturer, finding that the manufacturer had no duty to warn of the hazards of asbestos even if it was foreseeable that its machines would be used in conjunction with asbestos containing products, such as brakes.¹³ These cases are in direct contrast with the *Dummitt* decision in New York.

Also of note in California, the California Court of Appeals for the Second District, Division Seven, issued a decision in *Campbell v. Ford Motor Company*, 206 Cal. App. 4th 15, 141 Cal. Rptr. 3d 390 (2012) holding that a premise owner and employer owe no duty to protect family members of employees from secondary asbestos exposure. The Court noted “even assuming a property owner can reasonably be expected to foresee the risk of latent disease to a worker’s family members secondarily exposed to asbestos used on its premises; we must conclude strong public policy considerations counsel against imposing a duty of care on property owners for such secondary exposure.” *Id* at 32.

Alternative Causes of Mesothelioma

As malignancy claims continue to rise, efforts to identify other causes of mesothelioma continue. It is estimated that 10–20 percent of all mesothelioma cases are caused by something other than asbestos. Causal factors under consideration include genetics, carbon nanotubes, taconite, ionizing radiation, talc, vermiculite contaminated with tremolite and erionite. In 1987, erionite was classified as a known human carcinogen.¹⁴ Recently, erionite has received heightened focus from researchers searching for alternative causes of mesothelioma. There are deposits of erionite worldwide, including several locations in the U.S. (North Dakota, Nevada, California, South Dakota, Arizona, New

13. *Barker v. Hennessy Industries*, 206 Cal. App. 4th 140, 141 Cal. Rptr. 3d 616, 620 (2012).

14. http://en.wikipedia.org/wiki/Erionite#cite_note-1987b-4 (last visited 10/3/2012).

15. *Id.*

16. *Non-Commercial Asbestos Causes of Mesothelioma: Erionite, Tremolite*. Dr. Howard M. Sandler, September 2012.

17. *Id.*

Mexico, and Oregon).¹⁵ Erionite is 200 times more potent in causing malignancy than crocidolite.¹⁶ The threshold exposure for erionite is only one fiber-a-year over a 40 year period. Erionite can be differentiated in the lung tissue from other types of fibers.¹⁷ As more research is performed, doors to additional defenses and medical arguments are opened. It is integral that when dealing with an atypical disease pattern or exposure, all possible avenues of exposure are explored with a plaintiff.

Medicare Secondary Payer Reporting

Medicare reporting requirements are becoming stricter as you read this! As of October 1, 2012, the reporting threshold was lowered to \$5,000. As of October 1, 2013, the threshold will be \$2,000 and as of October 1, 2014, the threshold will be \$300. Eventually, all settlements for exposures occurring after December 5, 1980 will have to be reported. Defendants must exercise caution in adhering to the December 5, 1980 date. Even if deposition testimony places a plaintiff’s exposure before December 5, 1980, if the complaint and/or interrogatories allege otherwise, it is safer to err on the side of caution and report the claim. Any evidence of exposure after the December 5, 1980 date, such as the complaint or interrogatories, can be found to impose a duty to report the claim.

Many jurisdictions have already established joint agreements between the plaintiffs and defense bars to allow for easy implementation and compliance with Medicare, Medicaid, and the SCHIP Extension Act of 2007’s reporting requirements. It is important for a defendant to feel fully protected, and any joint agreement should be analyzed thoroughly before joining. Even if an agreement is in place, participation may not be required by the specific court and the defendant may be better protected by acting alone. This requires a defendant specific/jurisdiction specific analysis.

Conclusion

Recent trends, verdicts and events in 2011 and 2012 are definitely signaling significant changes for asbestos litigation. As the backlog of non-malignancy claims clears throughout the country, increases in amounts paid on resolved claims are expected to level out over the next two or three years. However, the total amount paid to resolve these claims is expected to increase as the number of lung cancer and mesothelioma cases continue to rise. In the coming year, defendants can expect more malignancies

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and more battles over the science in lung cancer claims. Defendants also can expect more states to rule on secondary exposure claims and liabilities of manufacturers for replacement parts that they neither manufactured nor supplied. Whether the new trial dockets and new judges will affect asbestos litigation in their respective jurisdiction remains to be seen, but 2011–2012 has given the defense bar reason to hope that the changes will be for the better. ♦

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