NEWSSTAND

The Threat of a New Wave of Foreign Asbestos Claimants in United States Courts

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In July 2009 in New Castle County in the State of Delaware, three separate plaintiffs filed civil suits against E. I. Du Pont De Nemours and Company, Inc. ("DuPont") alleging that their work at a DuPont textile plant in Mercedes, Argentina from 1961 to 2002 caused them to be exposed to and inhale asbestos fibers.[1] Specifically, these former DuPont employees (collectively "Plaintiffs") allege they developed asbestos-related diseases as a result of DuPont's negligence in creating and maintaining a dangerous work environment at DuPont's Mercedes, Argentina facility.

Asbestos litigation in the United States, like asbestos itself throughout the middle of the last century, is ever-present; however, the majority of asbestos claims in the United States are filed by plaintiffs that actually *live in the United States*. Plaintiffs reside in Argentina and concede in their complaints that the textile mill in Argentina is actually owned and operated by DuPont Argentina S.A. ("DuPont Argentina"), a duly organized corporation under the laws of Argentina. Nonetheless, Plaintiffs assert that DuPont is the parent company of DuPont Argentina and that the former directed and controlled the manufacture and use of asbestos by DuPont Argentina.

For over three decades, corporations and their insurances carriers have defended claims in the asbestos arena throughout the United States. Initially, plaintiffs with asbestos-related diseases – mesothelioma, asbestosis, lung cancer and pleural plaques – targeted corporations that mined and distributed raw asbestos fibers or manufactured products in the insulation trade. Indeed, literature and studies in the 1950s and 1960s focused primarily on the hazards of working with asbestos insulation products.

In the 1970s and early 1980s, studies and government regulations warned about asbestos-containing products such as cement pipe, joint compound, brakes, gaskets and roofing products and, consequently, asbestos litigation evolved so as to include this group of manufacturers in newly filed lawsuits. Today, insurance companies and their insureds still expend millions of dollars defending asbestos claims all over the United States; however, given government regulations concerning permissible exposure limits that were enacted as early as 1972, it is expected that fewer individuals will develop asbestos-related conditions in the future.[2] Notably, many experts expect that the number of asbestos claims in the United States will steadily decrease beginning in 2025.

With a foreseeable end of asbestos litigation in sight, the filing of new asbestos lawsuits in the United States that concern parties, premises and events from foreign countries is alarming. The costs inherent in defending asbestos claims in the United States can be exorbitant as attorneys and experts are retained to conduct discovery, disprove plaintiffs' allegations, provide medical, industrial and "state of the art" defenses, and ultimately settle or try asbestos cases. These costs could double if not triple if asbestos lawsuits concerning a plaintiff's exposure to an asbestos-containing product in a foreign country were permitted to be litigated in the United States simply because a defendant corporation has ties to the United States.

In response to Plaintiffs' complaint, DuPont filed a motion to dismiss on the grounds that Plaintiffs improperly sued DuPont instead of DuPont Argentina and that the doctrine of forum *non conveniens* requires that these cases proceed in Argentina where the facility, all of the witnesses and documents are located. In support of its argument, DuPont referenced a May 1, 2009 ruling issued by the Seventh Circuit Court of Appeals affirming the dismissal of two cases based on the doctrine of forum *non conveniens* brought by Argentines against United States corporations.[3] In the two cases before the Seventh Circuit, the plaintiffs referenced the Treaty of Friendship, Commerce and Navigation Between Argentina and the United States – signed into law by President Franklin Pierce on July 27, 1853 – for the proposition that they were entitled to sue the defendants in the United States. Judge Posner, writing for the Court, did not disagree but rather concluded that the lower courts reached the correct opinion that these cases should be litigated in Argentina because that was where the plaintiffs resided and were injured, but expressly left the door open to foreign plaintiffs to bring lawsuits in the U.S.

The prospect of a new wave of asbestos claimants from foreign countries being permitted to bring suit in the United States has significant ramifications for defendant corporations already involved in asbestos litigation, their insurance and reinsurance carriers, and many Courts in the United States. Significantly, as Plaintiffs' counsel warned in its June 24, 2009 press release, more suits based on foreign subsidiaries' use of asbestos in countries in Latin America, Africa and Asia are "soon to follow." True to his word, Plaintiff's counsel filed 19 additional cases on behalf of an additional 19 former employees of DuPont's foreign subsidiary, Dupont Argentina S.A. ("DASA") also filed four cases alleging household exposure and environmental claims related to DASA's manufacturing operations in Argentina. Should the Court in New Castle County deem Delaware a proper forum for Plaintiffs to file their asbestos lawsuits, aggressive plaintiffs' counsel and their injured claimants will certainly turn to United States courts for adjudication of their claims for years to come.

Endnotes

1. The plaintiffs, Cristian Dematei (C.A. No. 09C-06-247), Juan Carlos Laborda (C.A. No. O9C-06-248) and Ceferino Ramirez (C.A. No. 09C-06-249). Plaintiffs time at the textile facility varied but, as a whole, the dates of their employment ranged from 1961 to 2002.
2. The development of an asbestos-related condition follows a latency period of many years that is determined by the dose of the exposure to asbestos. Accordingly, an individual

exposed to asbestos may not develop an asbestos-related condition until 10 to 50 years from the date of the initial and subsequent exposures.

3. *See Abad v. Bayer Corp.*, 563 F.3d 663 (7th Cir. 2009)(concluding that Argentine courts would apply Argentine law in tort case because Argentina was where plaintiffs resided and were injured).