Toxic Torts Alert: Each and Every Exposure Theory

Trending Topic: Each and Every Exposure Theory

Since last Spring, a number of courts have addressed the validity of the "each and every exposure" theory (also known as the "any exposure," "special exposures," "cumulative exposures," "single fiber" or "one fiber" theory) as a basis for meeting a plaintiff's causation burden in asbestos exposure cases. Those rulings have been disparate:

***Evans v. 3M Company*, 2017 NY Slip Op. 30756(U), Docket No. 190109/15 (Apr. 17, 2017)**

Denying a Frye hearing and denying the defendant boiler manufacturer's motion in limine seeking to preclude the plaintiffs' causation experts, the administrative judge for the NYCAL asbestos docket rejected the defendant's contention that the experts were relying upon an "each and every exposure" theory. The trial judge emphasized that Dr. Carl Brodkin had provided a 66-page report that quantified the amount, duration and frequency of the decedent's exposures to boiler products. Additionally, the judge was satisfied with the representation of Plaintiffs' counsel that, although not reflected in his report, Dr. John Maddox would consider whether the decedent's exposures were repetitive and would refer to literature regarding the types of products made by the defendant. In light of competing citations to higher court decisions by both parties, the judge held that "[n]either the Appellate Division, [the Juni] decision . . ., nor the cited Court of Appeals' precedent, compel a different result." The judge held that the appellate court's decision in Juni, discussed infra, "is not applicable" because the products at issue in Juni were friction products "which degrade when used." Nevertheless, the judge went on to distinguish Juni by referencing the Juni experts' concessions that undermined their assertions, and by referencing the lack of any quantitative assessment in Juni, such as that provided by Dr. Brodkin in this case. In addition, the judge stated that "[t]o read [the New York Court of Appeals' decision in] Parker in the way defendants suggest [i.e. as requiring a precise defendant-specific numerical exposure value] would forestall recovery in nearly all asbestos cases." (Alterations added.)

***Phillips v. Honeywell Int'l, Inc.*, 9 Cal.App.5th 1061 (2017), review denied (Cal. June 14, 2017)**

In pertinent part, affirming the trial court's admission of the plaintiffs' expert causation opinion, the California Court of Appeal for the 5th District rejected the friction defendant's contention that the expert's "every identified exposure" opinion was the functional equivalent of an "every-exposure" opinion. During his deposition, the decedent had described performing one brake job per week over a two-year employment period as well as intermittent brake jobs on personal vehicles during a twenty-year period. Based upon that testimony, Plaintiffs' expert Dr. Carl Brodkin opined at trial that the decedent's work with the defendant's brakes was "an important component part of his cumulative exposure, and as such is a substantial contributing factor in his development of mesothelioma." The following testimony by Dr. Brodkin convinced the Court that his "identified-exposure" opinion is not an "every exposure" opinion in disguise but is instead "more rigorous" and requires "significant exposures": "I think the evidence strongly is against the notion that each and every asbestos fiber increases risk for disease. That's never been my opinion, and I don't think the science supports that. It takes significant exposures, for example, these exposures in an occupational setting, orders of magnitude higher than ambient levels, very high levels that overcome the body's defenses, add to the body's burden of asbestos that increases risk for disease." In light of its holding, the Court declined to consider the defendant's argument that the every-exposure theory adopted last year by the 2nd District in Davis, discussed infra, was wrong.

***Juni v. A.O. Water Products*, 48 N.Y.S.3d 365 (N.Y. App. Div. 2017)**

Affirming a New York trial court's order that granted a friction defendant's motion to set aside a plaintiff's verdict, the First Department of the Appellate Division agreed that the "plaintiff was obliged to prove not only that [the decedent's] mesothelioma was caused by exposure to asbestos, but that he was exposed to sufficient levels of the toxin from his work on brakes, clutches, or gaskets, sold or distributed by defendant, to have caused his illness." Plaintiff's expert Dr. Jacqueline Moline had opined generally that the decedent's "cumulative exposures to asbestos" caused his mesothelioma, but she had admitted that "there were no measures of what [Decedent] was exposed to." Plaintiff's other expert Dr. Steven Markowitz had generally opined that chrysotile in friction products "can" cause mesothelioma, but he had conceded that 21 of 22 epidemiological studies found no increased risk for mechanics working with friction products. In its analysis, the First Department agreed with the trial court that the standards set forth in two toxic exposure cases, Parker v. Mobil Oil Corp.(benzene) and Cornell v. 360 W. 51st St. Realty, LLC (mold), were applicable in an asbestos exposure case. Addressing the Dissenting Justice's opinion that the level of proof required in Parker and Cornell should not be required in an asbestos context, the Majority stated that "there is no valid distinction to be made between the difficulty of establishing exposure to, say, benzene in gasoline and exposure to asbestos. In each type of matter, a foundation must be made to support an expert's conclusion regarding causation." With respect to Plaintiff's "theory of cumulative exposure," the Court held that "at least in the manner proposed by plaintiffs, [the theory] is irreconcilable with the rule requiring at least some quantification or means of assessing the amount, duration, and frequency of exposure to determine whether exposure was sufficient to be found a contributing cause of the disease." The Court further held that "a plaintiff claiming that a defendant is liable for causing his or her mesothelioma must still establish some scientific basis for a finding of causation attributable to the particular defendant's product."

***Rost v. Ford Motor Co.*, 151 A.3d 1032 (Pa. 2016)**

Affirming the intermediate appellate court's decision that affirmed a trial court order denying the defendant's post-trial motions for judgment notwithstanding the verdict and/or a new trial, the Supreme Court of Pennsylvania agreed with the plaintiff that an expert may offer an opinion that every exposure to asbestos cumulatively contributes "to the total dose" (thereby increasing the likelihood of disease) without violating the Court's prior holdings in Betz v. Pneumo Abex, LLC and Gregg v. V-J Auto Parts, Co. The Majority stated that Betz and Gregg stand for the proposition that a plaintiff must offer evidence of sufficiently "frequent, regular and proximate" exposure to a defendant's product to create a jury question as to whether the defendant's product was substantially causative. The Majority reasoned that, in this case, Plaintiff's expert—Dr. Arthur Frank—was provided with a hypothetical detailing Decedent's exposure to Defendant's asbestos containing friction products and was able to testify that those exposures were a substantial factor in causing Decedent's mesothelioma. Therefore, the Majority concluded that, "[u]nlike the expert witness in Betz who unabashedly offered 'each and every breath' testimony," Dr. Frank "testified strictly in accordance [the] dictates in Gregg and Betz" by relying upon evidence of "frequent, regular and proximate" exposure to asbestos from the defendants' products. Additionally, the Majority disagreed with the contention of Defendant and the Dissenting Justices that Dr. Frank should have been required to quantify and compare Decedent's exposure to Defendant's products with his lifetime exposure to other products. The Majority explained that the focus of substantial factor causation is on exposure to the particular defendant's products, and other courts which have adopted the "frequency, regularity, and proximity" test are in accord.

***Crane Co. v. DeLisle*, 206 So.3d 94 (Fla. Dist. Ct. App. Nov. 9, 2016)**

In pertinent part, reversing the trial court's denial of a directed verdict for an equipment manufacturer defendant, the Florida District Court of Appeal for the Fourth District agreed with the defendant that the opinion of Plaintiff's expert Dr. James Dahlgren that "every exposure" to friable asbestos above background level—regardless of product, fiber type, and dose—would be a substantial contributing cause of mesothelioma does not satisfy the Dauberttest. The Court noted that "judicial reception to this [every exposure] theory has been largely negative" because it "lacks sufficient support in facts and data" and "cannot be tested, has not been published in peer-reviewed works, and has no known error rate." Finding that the "'every exposure' theory was insufficient to establish liability," the Court ultimately directed that a verdict be entered in

favor of the equipment defendant because Dr. Dahlgren's opinion was the only evidence as to causation offered by Plaintiff with respect to that defendant.

***Bell v. Foster Wheeler Energy Corp.*, No. 15-6394, 2016 WL 5847124 (E.D. La. Oct. 6, 2016), recon. denied, 2017 WL 876983 (E.D. La. Mar. 6, 2017)**

Granting in part the defendants' motions in limine, the District Court for the Eastern District of Louisiana agreed that Plaintiffs' experts Dr. Richard Kradin, Dr. Terry Kraus, and Mr. Frank Parker, III should be precluded from offering a "'specific causation opinion' . . . that a particular product caused [Plaintiff's] mesothelioma." The Court held that it "continues to be of the view that the each and every exposure theory 'is not an acceptable approach for a causation expert to take'" because "the rules of evidence do not permit an expert to testify that '[j]ust because we cannot rule anything out . . . we can rule everything in.'" In rejecting the experts' attempt to "cure the deficiencies with the each and every exposure theory" by adding the word "significant" to their opinions without spelling out what constitutes "a significant exposure," the Court emphasized that "'increasing the likelihood of disease is a different matter than actually causing the disease.'" Subsequently, in an order denying Plaintiff's motion for reconsideration of the Court's above-described decision, the Court responded to the following two requests for clarification raised by Plaintiff: (1) is an expert allowed to opine that certain scientific studies suggest that a plaintiff's exposures to the defendants' product were significant, and (2) is an expert allowed to opine that the levels to which a plaintiff was exposed to the defendants' products are recognized as significant exposures according to the literature. The judge responded as follows: "The answer to both questions is 'yes,' provided that it is made clear that the term 'significant' means only 'statistically significant' in the sense that exposure at a certain level for a certain duration can cause x in y number of people to develop mesothelioma. But plaintiffs' counsel should tread carefully in this area, as the Court will not permit a backdoor opinion as to specific causation in the guise of an opinion about what the studies suggest. To the extent counsel believes a question flirts with this line, they should approach the bench for guidance."

***Suoja v. Owens-Illinois, Inc.*, No. 99-CV-475-slc (W.D. Wis. Sept. 30, 2016)**

In entering judgment in favor of a thermal insulation manufacturer defendant following a three-day bench trial, the federal magistrate rejected a "cumulative exposure" opinion provided by the plaintiff's expert Dr. Arthur Frank. During pre-trial motion practice, in response to the defendant's motion to preclude Dr. Frank from giving an "any exposure" opinion, the plaintiff had assured the court that no such opinion would be presented at trial. Nevertheless, Dr. Frank went on to testify that he "is of the school that says the cumulative exposure . . is what did it . . ." and that "medically, scientifically, every exposure contributes to the totality of the exposure" because there is no scientific way to determine whether one was substantial and one was insubstantial. In determining that the plaintiff had failed to meet his burden of establishing substantial factor causation, the magistrate agreed with the defendant that Dr. Frank's "cumulative exposure" opinion is "no different from the 'any exposure' theory that plaintiff agreed he would not proffer at trial." The magistrate emphasized that Dr. Frank's failure to tie his causation opinion to "any specific quantum of exposure that was attributable to defendant" essentially leads to an opinion that "if there is exposure, then there is causation." The magistrate also deemed "unpersuasive" the plaintiff's contention that his expert need not compare exposures attributable to the defendant with exposures from other products the decedent used during his 40-year career because the defendant failed to prove that those other exposures were "substantial." On that issue, the magistrate stated that "[i]t is disingenuous for plaintiff to have obtained recovery from numerous bankruptcy trusts and asbestos manufacturers based upon sworn admissions of asbestos exposure and then to brush aside those admissions as irrelevant to causation in this lawsuit."

***Scapa Dryer Fabrics, Inc. v. Knight*, 788 S.E.2d 421 (Ga. 2016)**

Reversing the Georgia Court of Appeals' decision that affirmed the trial court's admission of expert testimony, the Georgia

Supreme Court agreed with the premises defendant that the "cumulative exposure" opinion proffered by Plaintiff's expert Dr. Jerrold Abraham's was not helpful to the jury because it failed to address whether the exposure at the defendant's facility was more than a de minimis contribution to the injury, as required by Georgia's causation standard. The Court rejected Dr. Abraham's testimony because it "essentially told the jury that it was unnecessary to resolve the extent of exposure at the [defendant's] facility—if the jury determined that [Plaintiff] was exposed at the facility to any asbestos beyond background." However, the Court was careful to note that it was not saying that a "cumulative exposure" theory could never be relevant to causation under Georgia law. Rather, the Court clarified that it was Dr. Abraham's failure to "undertake to estimate the extent of exposure in any meaningful way" and to limit his causation opinion to "such estimate of exposure" that was fatal to his "cumulative exposure" theory in this case.

***Schwartz v. Honeywell Int'l, Inc.*, 66 N.E. 3d 118 (Ohio Ct. App. 2016), discretionary appeal granted (Ohio Apr. 19, 2017)**

Affirming the trial court's denial of the defendant's motions in limine, the Ohio Court of Appeals for the Eighth District disagreed with the brake manufacturer defendant's assertion that the opinions of Plaintiff's experts, Dr. Carlos Bedrossian and Dr. Joseph H. Guth, amounted to an "each and every exposure" theory incapable of assisting on the issue of substantial factor causation. Although Dr. Bedrossian had testified that there is no known threshold of asbestos exposure at which mesothelioma will not occur, that there is a background concentration of asbestos found in the air anywhere, and that "it takes cumulative exposures" to cause mesothelioma, the Court concluded that Dr. Bedrossian's opinion was sufficient because it had in fact considered the manner, proximity, and frequency of Plaintiff's alleged exposures. The Court also held that it was "not necessary" for expert Dr. Guth to engage in a "quantitative analysis" or provide "testimony regarding a dose-response relationship;" rather, his "qualitative" assessment of whether an exposure was "significant . . . versus something that was not" would be admissible.

***Watkins v. Affinia Group*, 54 N.E.3d 174 (Ohio Ct. App. 2016)**

Reversing a jury verdict entered against a friction defendant, the Ohio Court of Appeals for the Eighth District agreed with the defendant that the trial court erred in admitting the plaintiffs' expert causation testimony without first conducting a Daubert hearing. At trial, Dr. James Strauchen and Dr. Arthur Frank had opined that the decedent's handling and sanding of the defendant's brakes was a substantial cause of his mesothelioma. As the appellate court explained, "Drs. Frank and Strauchen asserted that asbestos is the only proven cause of mesothelioma and that every exposure to asbestos increases an individual's risk of developing an asbestos-related disease." Thus, the Court found that "[d]espite [plaintiff]'s statements to the contrary, their opinions were premised on the notion that every exposure to asbestos is a substantial contributing cause to the development of mesothelioma." The Court went on to discuss sources acknowledging that it is "the dose that makes the poison' but also noted that the experts are not required to identify a particular dose with mathematical precision. The appellate court ultimately held that "[t]he trial court did not properly execute its duty as gatekeeper because, without a hearing, the court could not independently examine and evaluate the reliability of Drs. Frank's and Strauchen's expert testimony." With respect to the basis for Dr. Frank's opinion, the appellate pointed out that he relied in part on the "Helsinki Criteria" and that "courts have criticized the validity of the Helsinki Criteria on [several] grounds . . . ."

***McIndoe v. Huntington Ingalls Inc.*, 817 F.3d 1170 (9th Cir. 2016)**

Affirming the C.D. Cal.'s grant of summary judgment for the shipbuilders defendant under maritime law, the Ninth Circuit rejected testimony by Plaintiff's expert, Dr. Allen Raybin, who had offered only a "basic assertion that [the plaintiff's] exposure was significantly above ambient asbestos levels." Without opining as to the portion of the plaintiff's aggregate dose that was specifically attributable to the defendants, Dr. Allen's testimony failed to assist the jury, as it merely established general causation. The Court held that Plaintiffs' "every exposure" theory of liability "would undermine the

substantial factor standard and, in turn, significantly broaden asbestos liability based on fleeting or insignificant encounters with a defendant's product . . . ."

***Davis v. Honeywell Int'l, Inc.*, 245 Cal.App.4th 477 (2016)**

Affirming the trial court's denial of the defendant's motions in limine under California law, the California Court of Appeal for the 2nd District rebuffed the brake lining manufacturer defendant's contention that Plaintiff's experts, Dr. James A. Strauchen and Dr. William Rom, were required to establish the dose of asbestos attributable to the defendant's chrysotile asbestos-containing brake products. Although the Court ultimately concluded that Plaintiff's experts had in fact based their opinions on "an estimate of actual exposure" (based upon a hypothetical), the Court held that a defendant-specific "dose level estimation" was not required for the expert's opinion to assist the jury on the issue of substantial factor causation. Citing to the California Supreme Court's 1997 decision in Rutherford v. Owens-Illinois, Inc., which involved exposure to amosite asbestos-containing insulation, the Court held that a plaintiff need only show that a defendant's product contributed to the plaintiff's "aggregate" (i.e. "occupational") dose of asbestos.

Past Trending Topics

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Contact Us

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