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CHANGES COMING TO NEW YORK CITY ASBESTOS LITIGATION

By Walter L. McDonough, Esquire

For roughly 25 years, there have been very few changes in the way asbestos cases are tried in New York City. By way of background, in 1988, the Court entered a Case Management Order (CMO) which coordinated all asbestos cases which arose in any of the five counties, or boroughs, of New York. That order, with occasional modifications, has been in effect since that date. The order created the New York City Asbestos Litigation program, or "NYCAL," and it required that all cases be filed in New York County, as opposed to any of the other four counties (Bronx, Queens, Kings and Richmond). The stated purpose of the Case Management Order was to "encourage and bring about the fair, expeditious, and inexpensive resolution" of asbestos cases by 1) standardizing pleadings and discovery, 2) conducting early pretrial conferences, 3) grouping and ordering cases for trial with a firm trial date, and 4) coordinating discovery. The Case Management Order created the position of Special Master, a court appointed attorney hired to oversee discovery disputes, settlement conferences and certain other pre-trial matters. The Case Management Order also created three separate dockets for the listing of cases for trial: an accelerated docket, an active docket and a deferred docket. The accelerated docket is to be comprised of cases brought by terminally ill plaintiffs with a life expectancy of less than one year. The active docket is to be compromised of actions brought by plaintiffs who met certain minimum standard of impairment (based upon pulmonary function tests and an x-ray review by a B reader or a cancer diagnosis with a life expectancy of greater than one year). The deferred docket is to be

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comprised of cases brought by plaintiffs who did not meet the minimum standards of impairment set forth above. The accelerated cases were listed for trial upon application by plaintiff's counsel and are presently scheduled in "In Extremis Clusters" in April and October of each year. Cases in the active docket, also known as the "FIFO clusters" (first in, first out), are listed for trial on a chronological basis and are scheduled for trial during eight designated trial months per year in groups of 50. Cases on the deferred docket are not listed for trial unless and until plaintiffs' counsel moves to amend the complaint to allege that the plaintiff now meets the requirements set forth for inclusion in the active docket.

One significant portion of the Case Management Order dealt with the deferral of punitive damages. Section XVII of the CMO states quite simply that "counts for punitive damages are deferred until such time as the Court deems otherwise, upon notice and hearing." Over the years, there have been some modifications to the Case Management Order, but one proposed change which occurred two years ago sparked a call among defense counsel to redraft the entire order. In 2013, plaintiffs' counsel filed a motion to allow punitive damages in certain cases. After oral argument on the punitive damage issue, Justice Sherry Klein Heitler, who was the administrative judge who oversaw asbestos litigation at the time, granted plaintiffs' motion and amended the Case Management Order to allow plaintiffs to pursue punitive damages in certain circumstances. Defendants appealed Justice Heitler's decision and during the pendency of the appeal, Justice Heitler retired and in May of this year, she was replaced by Justice Peter Moulton. Justice Moulton has been a judge for eleven years, having first been elected as a judge on the New York City Civil Court in 2004 and then as a justice on the Supreme Court 1st Judicial District in 2013. .

In June of this year, the Appellate Division, First Department, heard oral argument on defendant's appeal of the order granting punitive damages. Less than a month later, the Appellate Court found that although the administrative judge had the authority to modify the Case Management Order, the manner in which punitive damages were to be allowed denied defendants' due process rights. The lower court had originally allowed plaintiffs to pursue punitive damages at the close of evidence at trial. Defendants argued that this procedure severely prejudiced them because they would not know until the end of trial whether or not punitive damages were being pursued against them. The Appellate Court agreed and remanded the matter back to the lower court to frame a more equitable manner for plaintiffs to pursue punitive damages that would not impinge upon defendants' rights.

In the meantime, defendants moved to stay all of the litigation for sixty days so that a new Case Management Order could be implemented. Apart from the re-instatement of punitive damages, one of the problems with the litigation as it has developed, according to defense counsel, is the grouping of cases for trial. Cases are consolidated for trial with little or no commonality of issues among the cases, a process which can be confusing to the jury according to the defense motion. Justice Moulton denied the motion for a stay by order dated August 28th, 2015, stating that "the court finds that the current state of NYCAL is not so rampantly unfair as to warrant suspending the trial, or the preparation for trials, of hundreds of cases where the plaintiffs have a mortal illness." However, he agreed that the defendants had raised issues which "warrant a complete re-examination of the CMO." Justice Moulton appointed a liaison committee of plaintiffs' counsel and defense counsel representatives to draft a new proposed order. That process is ongoing. Justice Moulton stated in his opinion that he hoped that the parties could reach agreement on certain substantial issues, but recognized that agreement on all issues was not likely. Justice Moulton will remain actively involved in the process to implement the new Case Management Order and once the proposals from all sides are submitted, the Court will prepare its own draft order and post it on the NYCAL website for a period of review and comment. After the period of comment has expired, the court will issue a new Case Management Order. Our best estimate is that a new Case Management Order will be in place by early next year.

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THOSE DEVILISH DETAILS: USING DOSE-RESPONSE DATA TO CHALLENGE AN EXPERT'S CONCLUSIONS

By: Eli Granek, Esquire

Defense counsel in toxic-tort litigation often find themselves quoting Paracelsus' famous maxim, "the dose makes the poison." This principle too often is ignored in courtrooms, seemingly dissipating after escaping counsel's lips before reaching its intended audience's ears. But over the last few years, courts across the country have appeared more receptive to the old adage. The Seventh Circuit, for example, recently affirmed a district court's decision to exclude plaintiffs' causation experts, in part because the experts relied on studies that reported on the effect of doses many times greater than the doses to which the plaintiffs were exposed. The Seventh Circuit's decision underscores the importance of evaluating each study an expert witness relies on, and assessing whether the study's data is sufficiently similar to the facts of a case for the data to support the expert's conclusion.

The Daubert Standard

In federal court, an expert witness may testify only if his or her testimony satisfies the indicia of reliability required by Federal Rule of Evidence 702 and Daubert v. Merrell Dow Pharmaceuticals, Inc. Rule 702 permits expert testimony where: (1) the expert's specialized knowledge will help the trier of fact understand the evidence or determine a fact in issue; (2) the testimony is based on sufficient facts or data; (3) the testimony is the product of reliable principles and methods; and (4) the expert reliably applied the principles and methods to the facts of the case.

Daubert offers several guideposts to help courts evaluate the reliability of an expert's methods and conclusions, but the Daubert factors are not exhaustive. Courts sometimes must also assess whether there is "too great an analytical gap between the data and the opinion proffered." In C.W. v. Textron, Inc., the trial court excluded the plaintiffs' experts' testimony for precisely this sin: the experts could not bridge the distance separating their opinions from the data on which they relied.

C.W. v. Textron, Inc.: expert witnesses must show their work

Plaintiffs in C.W. lived in Rochester, Indiana near a manufacturing plant that the defendant owned and operated until 2006. During the plant's operations, it released vinyl chloride—a toxic gas the EPA and other government agencies recognize as a carcinogen. The gas eventually seeped into the groundwater, contaminating, among other wells, one used by the plaintiffs.
According to the plaintiffs, their exposure to the vinyl-chloride-contaminated water caused them to suffer gastrointestinal ailments and increased their risk of developing cancer. Plaintiffs sued the plant's owner for negligence under Indiana law.

Indiana law requires that a plaintiff prove both "general" and "specific" causation to prevail on a negligence claim. Here, the general-causation element required the plaintiffs to prove that vinyl chloride could cause the alleged harm. The plaintiffs produced three experts, each of whom opined that vinyl chloride could and did cause the plaintiffs' gastrointestinal symptoms, and that the plaintiffs' exposure to vinyl chloride increased their risk of developing cancer. To support their conclusions, the plaintiffs' experts relied on published literature studying vinyl chloride's carcinogenicity.

After discovery was completed, and with trial approaching, the defendant filed motions in limine asking that the court exclude the plaintiffs' expert witnesses. The trial court granted the defendant's motion. In its opinion, the trial court explained that all three experts' opinions lacked the degree of reliability required by Daubert and Federal Rule of Evidence 702, in part because they relied on studies that were too attenuated from the circumstances presented by the case.
On appeal, the Seventh Circuit affirmed the trial court's ruling, holding that the trial court did not abuse its discretion when it rejected studies on which the plaintiffs' experts sought to rely as too attenuated from the facts of the case.

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In its decision, the Circuit Court reviewed two studies the trial court rejected that exemplified different lines of defective reasoning. One study the plaintiffs' expert sought to rely on may have had the "right" data but it reached the "wrong" conclusion. The study's authors fed vinyl chloride to a test group of rats and compared the number of tumors developed by the test group to those developed by a control group fed only olive oil. Plaintiffs' expert opined that this study demonstrated that the plaintiffs were at an increased risk of developing cancer. Noting that the study's authors found no statistically significant increase in tumors despite feeding the test group ten times the vinyl chloride the plaintiffs allegedly ingested, the Circuit Court held that the expert's conclusion "was an inferential leap that the district court was rightly unwilling to make."

The second rejected study reached the "right" conclusion but used the "wrong" data. This study analyzed the effect of vinyl chloride on adult workers over the course of five years and found that the workers experienced an increased risk of cancer. But the trial court correctly rejected this study as the basis for the plaintiffs' experts' opinion, the Circuit Court explained, because the study's subjects were exposed to an amount of vinyl chloride 1,000 times greater than the amount to which the plaintiffs allegedly were exposed. The disparity between the study's circumstances and C.W.'s facts, without evidence to bridge the chasm separating the two, rendered the study illegitimate as a basis for plaintiffs' experts' opinion that the plaintiffs' exposure to vinyl chloride increased their risk of developing cancer.

Conclusion

Always dynamic, toxic-tort litigation is continuing to evolve as the plaintiffs' bar seeks new defendants, products, and theories to replace those that no longer are viable. The last few years have shown an increase in claims, regulations, and commentary about products containing talc, vermiculite, nanotechnology, and genetically modified organisms, among other materials. As these issues are litigated, experts will have to find new ways to bridge the distance between the circumstances investigated in peer-reviewed literature and the facts presented by a particular case. Counsel defending against these claims must remember Paracelsus's maxim and guard against experts relying on studies that present "too great an analytical gap between the data and the opinion proffered."

In addition, counsel defending against long-litigated toxic-tort claims likewise should explore the differences between studies relied on by experts and the facts particular to the case or product they are defending. In asbestos litigation, for example, courts traditionally have accepted that asbestos can cause cancer with little inquiry into the necessary dose, the potential biological pathway(s), and the relationship between morphology and carcinogenicity. These questions may have been moot during the early decades of asbestos litigation, but they very much apply today.

First, plaintiffs today are more frequently alleging secondary exposure (e.g., take-home exposure), which means they would have been exposed to lower concentrations of asbestos, if any, than "traditional" asbestos plaintiffs. Second, unlike "traditional" defendants in asbestos litigation, which sold asbestos or asbestos-containing products, plaintiffs are beginning to pursue a new generation of defendants that did not sell asbestos products, but manufactured or sold products that allegedly were contaminated by asbestos. Finally, recent decisions from state and federal courts across the country suggest that courts are now willing to scrutinize whether plaintiffs have presented evidence of exposure above a dose-response threshold. With courts paying attention to dose-response data and the average plaintiff's likely exposure dropping, counsel should revisit the peer-reviewed literature to ensure it still supports experts' opinions.

Author Paul Auster wrote: "The truth of the story lies in the details." Every case is its own story. Make sure experts are not stretching the truth.

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JOINDER OF THE MANVILLE TRUST TO REDUCE POTENTIAL DAMAGES TO BE PAID BY DEFENDANTS

By Philip Castagna, Esquire and Edmund K. John, Esquire

Introduction

Over four years have elapsed since the enactment of 42 Pa. C.S.A. § 7102 (The "Fair Share Act") on June 28, 2011. Prior to the passage of the Fair Share Act, defendants involved in asbestos personal injury cases were limited by the law of Pennsylvania to joining only the JM Trust for discrete purposes and for limited impact on the award returned by a jury. The passage of the Fair Share Act was a welcome development for Defendants in the asbestos litigation, as the language and intent of the Act allowed for all bankrupt entities to be placed upon the verdict sheet for purposes of apportionment of liability. However, since there have been no Appellate decisions or statutory interpretation regarding the application of the Act, either broadly or in the context of strict liability, there is no consensus on how to ensure that bankrupt entities do in fact appear on the verdict sheet. In addition, joining the JM Trust as an additional Defendant utilizing the provisions set forth by the Manville Trust is a mechanism that has taken on newfound importance in the current litigation environment. Once the Trust is joined in a pending lawsuit, it must appear on the verdict sheet, as it is deemed to be a joint tortfeasor. Additionally, it is clear the intent of the Fair Share Act is to remove the requirement that Defendants pay the shortfall resulting from the abrogated claims in bankruptcy.

The Manville Trust

In nearly every asbestos case, plaintiffs obtain monies from trusts that were set up by bankrupt entities, including, but certainly not limited to, Johns-Manville. Each trust is governed by Trust Distribution Procedures (TDP), which mandate how claims are valued and what documentation is necessary for a proof of claim. However, the Manville Trust is unique among the operating trusts in that its TDP contains several procedural provisions that are helpful tools to Defendants, most importantly the ability to join the Trust as an additional Defendant, and a directive that the Trust is not to be treated as a bankrupt entity. Therefore, Defendants in the asbestos personal injury litigation have been able to join the JM Trust and the Trust will appear on the verdict sheet for the purpose of determining whether a plaintiff's exposure to JM asbestos containing products was a proximate cause of a plaintiff's asbestos related disease.

Since the inception of the JM Trust, Defendants have had the ability to assert third-party claims against the Trust. Under the TDP Section entitled "Litigation Between Trust Beneficiaries", Defendants are given the right to join the Trust for "The sole purpose of listing the Trust on a verdict form...". See paragraph I1.(c) found on page 22 of the January 2012 Revisions of the 2002 Manville TDP. Under paragraph I1(c) of the TDP, there is no specified time when the joinder must take place. Furthermore, under the TDP the Trust is not to enter its appearance or respond to the joinder. Neither the plaintiff nor the Trust may object to the joinder of the Trust.

Negotiations between the Plaintiffs and the Defendants with the JM Trust produced the valuable concession that the Trust permits Johns-Manville to be included on a verdict sheet. Furthermore, neither the Trust nor the Claimant (the Plaintiff) is permitted to object to the Joinder of the Trust. The status of the Manville Trust as a joint tortfeasor under the TDP ensures that they will appear on the verdict sheet if joined. Furthermore, the joinder rules of the TDP operate independently of the Pennsylvania Rules of Civil Procedure regarding Joinder (Pa. R.C.P § 2253) as well as the special rules regarding asbestos actions (Pa. R.C.P. § 1041 et seq.)

Pennsylvania Case Law

As noted, this provision has been in Manville's TDP since the Trust's inception in 1988, but was rarely utilized in Pennsylvania litigation due to its perceived limited utility in the light of the Baker and Andoloro decisions. In Baker v. AC & S, 755 A.2d 664 (Pa. 2000), the Pennsylvania Supreme Court held that a release with the Manville Trust only operated in a pro tanto fashion, and the non-settling Defendant (AC&S) was required to make up the $410,000 difference between what the Manville Trust actually paid ($30,000) and the damages assessed to

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them ($440,000). While the Superior Court in the underlying case did note that this would result in AC&S paying more than their share of damages, the Court pointed to the fact that AC&S was involved in the actual negotiation of the TDP, and had derived the benefit of treating the Trust as a joint tortfeasor. Baker v AC & S, 729 A.2d 1140 at 1152 (Pa. Super. 1999).

In Andoloro v. Armstrong World Industries, 799 A.2d 71 (Pa. Super. 2002), the Superior Court extended the pro tanto rationale to situations where a settlement had yet to be reached with the Manville Trust, holding that the set-off will be calculated under the TDP and that the non-settling Defendant(s) must pay the shortfall. Andoloro, at 81. Consequently, Defendants by and large no longer joined the Manville Trust, as it was considered of little utility, as the Manville Trust was the only representation of a bankrupt entity that could appear on the verdict sheet. Due to the valuation of the claims, Plaintiffs would only collect 10% of the valuation of the claim based on disease type, and the Defendants would still be liable to make up the shortfall. Courts in nearby jurisdictions have also applied a pro tanto reduction for bankrupt claims. Scapa Dryer Group v. Saville, 16 A.3d 159 (Md. Appeal. 2011).

The Fair Share Act

In an effort to move Pennsylvania in line with the 40 other States that do not permit pure joint and several liability and to ensure that a peripheral Defendant was not responsible for payment of the entire judgment, what is commonly called the Fair Share Act was enacted in 2011. The Fair Share Act modifies the prior joint and several liability rules and clearly contemplates both negligence and strict liability actions, providing that each defendant shall be liable for only the ratio of the damages apportioned to it (several liability), subject to several exceptions, the most important of which is that a Defendant is jointly and severally liable if they are found over 60% liable. Furthermore, the Act, under Section A.2, allows transmittal of settled defendants and non-parties to the trier of fact for apportionment purposes. Additionally, and this is a key factor with respect to the Fair Share Act, the Trust is to be treated as a legally responsible tortfeasor under applicable law, without a further need of proof, and is not to be treated as a bankrupt entity.

In an asbestos case, where bankrupt entities as well as settling parties often bear much more responsibility for a Plaintiff's disease, it is crucial that Defendants use all possible means at their disposal to ensure the appearance of all responsible parties on the verdict sheet to both ensure that no client is ever found 60% liable to trigger joint and several liability, as well as ensuring the percentage allocated to each individual Defendant is minimized to the greatest extent possible. Given that Manville was a leading entity in the sale of asbestos-containing products, their presence greatly enhances the likelihood that no other Defendant will be found 60% liable, and that only several liability will apply. Plaintiffs no longer have the threat of proving one purchase of a product or one change of a gasket as a Sword of Damocles to extract a large settlement.

As noted, there have been no reported decisions on the Fair Share Act. Pennsylvania Courts have held that a statute cannot be interpreted in a manner that yields an absurd result. Doctor's Choice Physical Medicine v. Travelers, 92 A.2d 313 (Pa. Super. 2014). The Fair Share Act clearly contemplates strict liability actions as they are enumerated in § 7102 (a.1), which provides that a Defendant will be severally liable unless one of several provisions is met. § 7102 (a.2) clearly intends for non-parties, and bankrupt entities to appear on the verdict sheet for purposes of apportionment of liability if appropriate proof is made. In asbestos actions, all parties are bound by the TDP, which clearly states that the joinder is at the discretion of the Defendant and serves as proof to establish Manville as a joint tortfeasor. A fair reading and interpretation of the Act would also necessarily overrule Baker and Andoloro and not compel Defendants to make up the shortfall from the share allocated to the bankrupt Defendants, as the statute clearly limits liability to the dollar amount awarded with respect to the portion allocated to that particular Defendant.

Recent Developments

Although defendants argue that the intent of the Fair Share Act is that all bankrupt entities named by the plaintiff or proven in by the Defendants are to be placed on the verdict sheet to ensure equity in payment of damages in light of fault apportionment, the vacuum left by the lack of guidance by the Courts has led to rulings inconsistent with this provision. In light of the fact that there are no Appellate decisions regarding the Fair Share Act more than four years after its enactment, the Manville Trust's unique TDP allowing joinder as an additional Defendant is especially important given the inconsistency in rulings regarding the inclusion of bankrupt entities on verdict sheets in asbestos matters in Philadelphia County.

In 2014, the Honorable Webster Keogh, presiding in the Estate of Hogan v. John Crane, Philadelphia County Court of Common Pleas, August Term 2012, No. 2323, ruled that the bankrupt entities could not be placed on the verdict sheet for fault apportionment purposes, and that fault would be apportioned on a pro rata basis. There was no dispute that the Fair Share Act was applicable in the Hogan case. Conversely, in January of 2015, the Honorable Lisette Shirdan-Harris, presiding in Hicks v. Crane Co, Philadelphia Court of Common Pleas, September 2012, No. 2067, where Swartz Campbell assisted as Trial Counsel, the Judge allowed inclusion of bankrupt entities with which Plaintiff has settled and received monies, including Johns-Manville, on the verdict sheet for purposes of apportionment of liability. Swartz Campbell had joined the Manville Trust as an additional Defendant. The Jury found none of the parties were negligent and returned a Defense verdict.

Plaintiffs have attempted to object to the Joinder of the Manville Trust, mistakenly relying on Pennsylvania Rules of Civil Procedure regarding Joinder that are inapplicable for the specific context and purpose of Joinder of the Manville Trust. Pa. R.C.P § 2253 provides that Joinder after 60 days requires leave of Court, but that rule is not applicable to asbestos actions, which are governed by Pa. R.C.P 1041.1(e), which expressly overrules that requirement. As noted, the Manville TDP allows joinder and does not permit objection to the joinder.
The Manville Trust is not being joined for purposes of indemnification or contribution, but only for purposes of apportionment of liability, language that appears in both the Trust Distribution Procedures as well as the Fair Share Act. Section A.2 of the Fair Share Act does not discuss contribution or indemnity, only apportionment of responsibility.

Conclusion
In conclusion, the mechanism to allow joinder of the Manville Trust and other bankrupt defendants has now become a potent weapon in defense of asbestos cases. The Fair Share Act does not change the applicable Pennsylvania law or the provisions of the TDP that grant the discretion of joinder to the Defendants independent of the Pennsylvania Rules of Civil Procedure. It is incumbent upon Defendants to use the tools at their disposal to get all tortfeasors, including but not limited to the JM Trust on the verdict sheet for apportionment purposes in light of the Fair Share Act.

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CONSTITUTIONAL CHALLENGE TO THE IRE SYSTEM IN PENNSYLVANIA – A MINOR HURDLE OR THE BEGINNING OF THE END FOR INDEPENDENT RATING EVALUATIONS?

By Gabor Ovari, Esquire

The Commonwealth Court of Pennsylvania in a recent surprising decision determined that the Impairment Rating Evaluation (IRE) process utilizing the fifth and sixth editions of the American Medical Association Guides to the Evaluation of Permanent Impairment is unconstitutional. The Court ultimately concluded that Section 306(a.2) of the Act, which enables the use of the most recent edition the Guide for Impairment Rating Evaluations, is an unconstitutional delegation of legislative power to a private party. Only the fourth edition of the AMA Guides may be used in determining a claimant's degree of impairment.
Section 306(a.2) of the Act provides that an employer may request that a claimant submit to an evaluation by a physician for the purposes of determining an individual's degree of impairment. If claimant is determined to have less than fifty percent whole body impairment, wage-loss benefits will be limited to 500 weeks in duration. As a result, the IRE can be a very powerful tool in the Employer's arsenal to mitigate exposure or to help negotiate an advantageous settlement. The physician performing the IRE is designated by the Bureau of Workers' Compensation. Up to now, the physician was mandated by the Act to utilize the most recent edition of the AMA Guide to assign the impairment rating. Currently the Guide is the sixth edition. However, at the time the statutory provision was created, the fourth edition was the most recent.

The Protz case involved a constitutional challenge by claimant to this statutory scheme. Claimant argued that the fifth and sixth editions resulted in an unconstitutional delegation of authority pursuant to Article II, Section 1 of the Pennsylvania Constitution, because it permitted private parties, such as the AMA, to engage in legislative functions. Claimant's argument was that the AMA was able to determine the standards used for rating impairment without the input of a governmental body.

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The facts of the case were straightforward as they followed the normal course of litigation of IRE determinations. The Employer, the Derry Area School District, filed a petition to modify Claimant's benefits after it received an Impairment Rating Evaluation that indicated that Claimant was at ten percent whole person impairment. This was, of course, below the fifty percent threshold. The WCJ granted the Modification Petition, finding that since Claimant has a whole person impairment rating of below fifty percent, she is entitled only to partial disability benefits. Claimant appealed to the Board raising a constitutional challenge to Section 306(a.2) of the Act. The Board however affirmed the WCJ finding that the constitutionality of the section had been addressed by the Commonwealth Court on prior occasions. In fact, the specific section has been cited as an example of a constitutional delegation of power.

The Court agreed with Claimant and held that Section 306(a.2) of the Act is an unconstitutional delegation of legislative authority. The statutory section enabled newer editions of the AMA Guides to be approved without review by the legislature. Therefore the Court found that the use of the more recent editions is improper and remanded to the workers' compensation judge to apply the fourth edition. The Court's reasoned that Section 306(a.2) failed to provide any standards to guide the AMA's determination regarding the methods to be used in determining the impairment ratings. Since a Workers' Compensation Judges would be bound by the AMA's standards, legislative review of the Guide would be necessary before a new edition could be utilized in legal proceedings.

Petition for allowance of appeal will be likely filed with the Pennsylvania Supreme Court by both Claimant and Employer. Claimant's argument will likely be that any modification pursuant to the IRE process should be considered to be void ab initio. Since the modification pursuant to an IRE was the result of an unconstitutional mechanism, Claimant will argue that benefits cannot be caped at 500 weeks because of this unconstitutional section of the Act. Therefore, even use of the fourth edition of the Guide should be unconstitutional. In contrast, the Employer will likely argue that the Commonwealth Court's decision should be overturned because Section 306(a.2) does not represent unconstitutional delegation of powers. In the alternative, the Employer will likely assert that this issue should be limited to cases where an appeal is pending on an IRE case, and specifically, should be limited to cases where the Claimant preserved the constitutional argument for appeal.

Moving forward, it will be necessary to assess the Protz decision and workers' compensation claims based on specific factual scenarios. There are strategies that should be considered relative to specific situations in light of the Protz decision and the potential Supreme Court appeal and ruling. There are two very common scenarios where the case will likely have a significant impact.

> *1. Modifications based on IREs under the fifth and sixth editions outside of the 60-day window for appeal Since the ruling will most likely not be applied retroactively, prior modifications based on the more recent editions should remain binding. As with any modification outside of the 60-day window, claimants may challenge the modification by obtaining an impairment rating of 50% or greater and filing a petition. Under the Protz ruling, the calculation will be made based on the fourth, rather than fifth and sixth editions.*

> *2. Cases currently in litigation, before a workers' compensation judge, the Board, or the Commonwealth Court, involving an IRE.*

In these cases there are two possible ways to proceed. First, the Judge may be presented with the request to stay the proceedings pending the Supreme Court's determination about the appeal in the Protz case. The second option is to request an addendum report using the fourth edition and submit that to the record. In this situation, all potential outcomes are covered.
Going forward, at least in the short term, the best possible tactic seems to be to use the fourth edition of the AMA Guide for IREs. However, these should be always coupled with an addendum report utilizing the sixth edition. This strategy would cover both possible outcomes should the Supreme Court reverse or affirm the Commonwealth Court's decision.

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WHERE HAVE ALL THE BANKRUPTS GONE? THE IMPACT OF BANKRUPTCY FILINGS ON PRODUCT IDENTIFICATION IN ASBESTOS CASES

By Gaylene Gordon Patterson, Esquire

For those attorneys who have defended asbestos personal injury lawsuits since the 1980s and 1990s, there is something lacking in discovery conducted in recently filed cases. That something is identification of asbestos containing materials manufactured, distributed or sold by companies that have filed for bankruptcy beginning with Johns Manville's filing in 1982. Today, the only mention of Kaylo is for the Owens-Illinois product with only the sporadic mention of the Owens-Corning product of the same name. Rarely are the asbestos containing products of Johns-Manville, Celotex, Eagle Picher, Keene or Philip Carey/Rapid American, all companies that filed for bankruptcy protection early in the litigation, identified at deposition or in answers to interrogatories.

A recent Rand study, "Bankruptcy's Effect on Product Identification on Asbestos Personal Injury Cases" by Lloyd Dixon and Geoffrey McGovern, confirms what many defense attorneys have noted anecdotally for years. The more time that passes between a defendant filing for bankruptcy protection and the production or discovery responses or the taking of a deposition in a lawsuit, the less likely it is that the bankrupt defendant is identified as a source of the injured party's asbestos exposure. The complete study, which was supported in part by nine frequently named defendants in the asbestos litigation, can be found at: http://www.rand.org/content/dam/rand/pubs/research_reports/RR900/RR907/RAND_RR907.pdf.

In conducting the study, the authors evaluated answers to interrogatories and depositions for 47 cases filed in New York state court where the injured party was employed at the Brooklyn Naval Shipyard between 1940 and 1949 and 39 cases filed in California state court where the injured party joined the Navy between 1950 and 1954 and was stationed at West Coast naval bases or on ships serviced in West Coast shipyards. Each of the selected cases was filed on or after 1998 in order to increase the chances that discovery responses and deposition transcripts could be located. All of the plaintiffs had a diagnosis of mesothelioma. Further, these cases were selected on the likelihood that maritime law, which requires proof that plaintiff's exposure to a particular product was a substantial factor in causing the injury, would be applied.

The authors limited their review to just two states in an attempt to minimize differences in court rules and procedures. They also chose states with several liability rationalizing that the plaintiffs' would be less motivated to identify exposure to the products of bankrupt defendants. The authors also limited their study to those defendants who filed for bankruptcy between 1995 and 2010. The authors felt that including the pre-1995 bankruptcy filings where the company would never

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have a period of solvency when the lawsuits were filed would be of limited value in evaluating whether there was a decline in identification of the company. This date selection effectively removed some of the major asbestos product manufacturers from the study including Johns-Manville. The study notes that 26 defendants filed for bankruptcy prior to 1995 and that between 1995 and 2010, an additional 67 companies filed for bankruptcy for a total of 93 bankruptcy filings by the close of 2010. Today, there are more than 100 companies that have sought the protection from the asbestos litigation by filing for bankruptcy.

The study reviewed answers to interrogatories and deposition transcripts located in 86 case files meeting the above criteria gathered by defendants in the litigation. Most of the defendants that gathered this documentation sponsored, in part, the study which could lead to charges that the study was unduly influenced by the sponsors/defendants. It was noted that the two sets of data were governed by two different case management orders leading to some differences in the amount and/or type of available exposure information. Interrogatories for the New York cases request information regarding asbestos containing materials/products including brand and manufacturer names. The California case management order required a listing of each period of employment where exposure to asbestos containing materials was alleged, but did not require identification of the brands and/or manufacturers of those products.

The analysis of discovery responses and deposition testimony revealed a gradual decline in the identification of products manufactured, distributed and/or installed by entities that had filed for bankruptcy. This result was similar for both the New York and the California cases. In those cases filed during the first year after a bankruptcy filing, there was a statistically insignificant drop in the identification of the bankrupt entity's product(s). However, in the cases filed during the second year after a bankruptcy filing and cases filed two or more years after the bankruptcy filing, the was a "considerable" drop in the identification of the bankrupt entity's products. Although the drop was slightly less in the cases filed in California, it was noted that the drop in identification was still "substantial" in those cases.

The authors also reviewed the deposition transcripts to evaluate the efforts of defense counsel to elicit testimony regarding exposure to the products of bankrupt companies. This review led to the finding that defense counsel rarely questions a plaintiff or product identification witness about exposure to the bankrupt company's product(s) in an attempt to counter the drop in identification following a bankruptcy filing. Further, they concluded that, if asked, plaintiffs rarely denied exposure to a bankrupt defendant's product or stated that they were unsure of such exposure.

The study concluded that failure to explore all possible exposures to asbestos containing materials can lead to a solvent defendant paying more money to the plaintiff. On the flip side of that equation, a plaintiff may receive more compensation based upon higher recovery from solvent defendants as well as monies received from operating bankruptcy trusts. Interviews with plaintiffs' counsel revealed that they felt no obligation to proactively identify all possible sources of asbestos exposure noting that defense counsel had the opportunity to explore such exposure at deposition. Defense counsel pointed to a number of factors that discourage exploring exposures to products associated with bankrupt defendants including time limitations on depositions, fears that a jury would be unable to distinguish between the products of solvent and insolvent companies resulting in greater exposure and retaliation in the form of more frequent namings in lawsuits by plaintiffs' counsel.

It should be noted that the authors of the study, while concluding that identification of bankrupt defendants was clearly established in the two groups of cases they evaluated, cautioned against extrapolating the study's findings across the board in all asbestos personal injury cases based upon the limited number of cases reviewed and the narrow parameters used to identify those cases. Defense counsel however should have little reason to discount the findings based upon their own experiences in the asbestos personal injury litigation.

Special thanks to Eli Granek, Esq. for bringing this study to my attention.

Gaylene Patterson is a partner in the firm's Philadelphia office.

News & Firm Notes

- **Edmund K. John, Esq.** and **Gaylene Gordon Patterson, Esq.**, partners in the Philadelphia office, successfully argued in the Allegheny County Court of Common Pleas against plaintiffs' motion to consolidate two para occupational exposure cases for trial. They demonstrated to the Court that the two cases had the following significant legal and factual distinctions: (1) the plaintiffs were not diagnosed with the same disease; (2) the plaintiffs did not have the same exposure history; (3) the plaintiffs did not have similar damages claims; (4) the husbands of the plaintiffs did not work at the same worksites, did not work in the same departments, did not have the same occupations, and did not work with and/or were exposed to the same asbestos containing products; (5) there were only two common defendants out of approximately 58 named in both suits; and, (6) the plaintiffs did not rely upon the same medical expert(s).

- **Kristin S. Mutzig, Esq.**, of the firm's Philadelphia office received two defense verdicts in the Court of Common Pleas on behalf of the Southeastern Pennsylvania Transportation Authority this past Spring. Luise v. SEPTA In the first case, Plaintiff claimed she was a passenger on a SEPTA bus when the operator slammed on the brakes causing her to be thrown out of her seat and injure her back and knees. While Plaintiff admitted the operator slammed on the brakes to avoid a collision with another vehicle, she alleged the operator had been driving the bus way too fast. As a result of the sudden braking, Plaintiff claimed she injured her back and both her knees which resulted in her having to undergo bilateral knee replacement surgery just eight months later. Following the surgery, she brought suit against SEPTA for both negligence and uninsured motorist benefits.

  Before trial, we offered SEPTA's uninsured motorists limits of $15,000 to resolve the claim. Plaintiff would not consider our offer and demanded $250,000. During trial, Plaintiff waived her claim for uninsured motorist benefits and proceeded against SEPTA only on her negligence claim. After a three day trial, the jury returned a verdict in favor of SEPTA. No appeal was taken. Hayes v. SEPTA v. Mohammad Shaikh (pro se)

  In the second case, Plaintiff claimed she sustained a herniation in her back as a result of an accident involving a SEPTA bus of which she was a passenger, and a vehicle operated by the Additional Defendant, Mohammad Shaikh. The accident occurred when Shaikh had made a right hand turn directly in front of the SEPTA bus that had already pulled away from a bus stop. Plaintiff alleged that as a result of the impact she was thrown violently forward and backward in her chair causing her to suffer a herniation. The crucial evidence consisted of a SEPTA video which displayed Plaintiff sitting in her seat and barely moving when the impact occurred. Despite this video, Plaintiff still claimed she was severally injured and brought suit against SEPTA who subsequently joined Shaikh as an additional defendant.

  Upon viewing the SEPTA video, Judge Lisa Rau transferred the case to the Arbitration program stating she "w[ould] not waste a jury's time with this". After an Arbitration panel found in favor of SEPTA, and against Shaikh in the amount of $8,500.00, Plaintiff appealed. Several months later, in June 2015, Plaintiff tried her case again, this time to a jury. After a three day trial, the jury found no negligence on either defendant and returned a defense verdict in favor of SEPTA and Shaikh. No appeal was taken.

  Through several motions filed in 2014 and 2015, Beth Valocchi and Joe Naylor of Swartz Campbell's Wilmington office were able to obtain dismissal of client Dana Companies LLC in approximately 200 pending asbestos cases based on lack of personal jurisdiction (virtually Dana Companies' entire docket of pending Delaware cases). At all relevant times, Dana Companies was a Virginia limited liability company with its principal place of business in Ohio. None of the Plaintiffs in any of these cases lived in Delaware; nor was it alleged that they were exposed to asbestos in Delaware. In holding that it lacked both general and specific jurisdiction in all of the subject cases, the Court discussed but declined to apply the recent U.S. Supreme Court holding in Daimler AG v. Bauman, 134 S.Ct. 746 (2014), for the proposition that

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NEWS & FIRM NOTES

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barring exceptional circumstances, general jurisdiction over a corporate defendant only exists in two locations – where the entity is incorporated and where the entity has its principal place of business. But as controlling U.S. Supreme Court precedent on due process, Daimler will likely remain the starting point for any general jurisdiction analysis, in Delaware or otherwise. Personal jurisdiction is a defense that many Defendants in product-liability should consider asserting in other jurisdictions in light of the U.S. Supreme Court holding in Daimler, which arguably limits the scope of general jurisdiction substantially.

➤ **Gabor Ovari, Esq.**, of the firm's Harrisburg office, recently prevailed on a Termination Petition before a Workers' Compensation Judge. Claimant sustained a work-related injury in 1999, which was accepted by the carrier. The injury was accepted as a low back strain. Claimant received temporary total disability benefits without ever returning to work. However, recently a full recovery opinion was obtained from an Independent Medical Examiner who opined that Claimant's symptoms were not related to the 1999 work injury; rather they were caused by the degeneration of her low back scoliosis that Claimant had since adolescence. Nevertheless, Claimant argued that she had failed back syndrome due to her work injury. She presented the testimony of a back surgeon from New York City, whom Claimant treated with on a monthly basis. Claimant's doctor testified that Claimant sustained a herniation due to the incident in 1999, which was the cause of her current complaints. The Judge found the Independent Medical Expert more credible than Claimant or her treating physician. He also found that the injury description was never expanded beyond a strain and sprain. After considering the evidence, and the credibility of the witness, including Claimant's testimony, the Workers' Compensation Judge found that termination of benefits was warranted by the medial evidence.

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