

ASBESTOS UPDATE

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Ever wonder what happens after a person calls the 1-800 number advertising legal representation in mesothelioma cases (a.k.a., asbestos cases)? In the majority of cases, the call, if legitimate, results in a mesothelioma lawyer getting involved, which eventually results in complex civil litigation. Both the plaintiff (the person alleging injury) and the defendants (those alleged to have introduced the asbestos in some manner) are typically represented by attorneys who devote much, if not all of their practice to asbestos cases. These are not usually class action cases. While some cases involve multiple plaintiffs, the typical asbestos case involves one plaintiff, possibly that plaintiff's family, and a group of defendants (ten to thirty, in most cases), all alleged to have caused the plaintiff's illness.

Over the years the law and the science applied to asbestos lawsuits have seen many changes. My article will provide an update of asbestos litigation from the viewpoint of a mass tort practice group manager. The following will discuss recent developments including a Supreme Court review of an asbestos case, the recent emergence of contaminated talc cases, and a look at a new argument regarding the causation of mesothelioma – your genes.

Update by the Numbers

Statistically, asbestos litigation remains a significant contribution to the civil dockets of courts around the United States. Courts of general jurisdiction, as well as specialized asbestos litigation dockets, will handle over 2,770 new asbestos filings in 2018. This number represents a decrease of 12% from last year. However, computer estimates suggest that asbestos claims will continue for another thirty years, until approximately the year 2047. Of the suits claiming damages resulting from asbestos exposure, half are mesothelioma cases, about a quarter are lung cancer, and the remaining cases involve non-malignant illnesses such as asbestosis and other breathing problems.

Asbestos in the U.S. Supreme Court

A potentially major decision impacting asbestos litigation is currently pending in the Supreme Court of the United States. In October of 2018, the high Court heard oral arguments in the matter captioned *Air & Liquid Systems Corp. v. DeVries*, No. 17-1104. This suit involves a group of Navy sailors who allegedly developed mesothelioma from asbestos exposure. Defendants include Air & Liquid Systems and other large companies that manufactured equipment used by the U.S. Navy aboard vessels.

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The main issue before Court is the application of the “bare-metal defense.” The federal circuit courts are split on how to apply this defense. Defendants argue that a complete defense applies when asbestos component parts are replaced by third parties, and that the original manufacturer of the product that uses those parts is not liable. Defendants further assert that a manufacturer of a product should not be held liable if the component parts, not known to be dangerous at the time of manufacture are revealed by new science, after the product left the manufacturer, to pose a threat to the end user. The Plaintiffs argue that the bare metal defense still requires product manufacturers, if acting reasonably, to warn about known dangers that arise from the intended use of the products. Plaintiff’s position would likely require greater analyses into whether the manufacturer had reason or should have known about the dangers of asbestos at the time of manufacture.

The ramifications of this decision will largely depend on whether the Court makes rulings specific to maritime law or applies them to asbestos litigation in general. If the ruling is specific, its application may be limited to future maritime cases. However the Court could make more general findings in its decision, in which case the ruling would be applicable in the vast majority of asbestos actions. A ruling favoring defendants, if not specific to maritime cases, could greatly reduce the time and resources currently expended by litigants across the nation. The decision in this matter should be handed down on or before June of 2019.

Talc Talk

From asbestos placed aboard Navy ships decades ago, we now turn to products sold in stores today. Anyone associated with asbestos litigation as well as many others not at all involved in the legal field are aware of the large verdict recently awarded in a suit involving allegations of contaminated talc and personal care products. Even before the multi-billion dollar verdict came out of a St. Louis court, asbestos litigation saw an increase in the amount of cases involving allegations related to talc. It hard to say at this point whether contaminated talc related suits will continue to increase, but for now it may be important to have a basic understanding of talc in the asbestos arena.

Both talc and asbestos are naturally occurring minerals that may be found in close proximity in the earth. Questions about the potential contamination of talc with asbestos have been raised since the 1970s, but recently, plaintiffs have named talc suppliers and companies that use talc as an ingredient in personal products, powders and cosmetics as defendants in asbestos lawsuits. It is worth noting, and generally accepted, that most organizations do not classify pure talc as carcinogenic. Talc can and should be differentiated from other products associated with asbestos such as insulation or brake parts, which at times, have required and incorporated the use of asbestos. Asbestos has never been an ingredient in any talc product.

Genetics in Asbestos Cases

Delving even deeper into the medical side of asbestos litigation, advances have been made in the field of genetics that may help determine whether asbestos caused a person’s mesothelioma or whether the illness was purely caused by the person’s genes. Asbestos has been and still remains the most common etiology of mesothelioma. However, and unfortunately, the medical

field knows that certain people are predetermined to develop malignancy. But, can it be argued that a gene mutation actually caused mesothelioma? Studies are showing that yes, some gene mutations can occur in the absence of asbestos exposure and lead to the development of malignant mesothelioma.

Studies have identified a gene mutation that causes mesothelioma that can be passed down by parents. The identified gene is known as BAP1. A mutated BAP1 gene creates a protein, BRCA1, which signals for cells to grow uncontrollably and develop into tumors. Thus, a mutated BAP1 gene, inherited from a person's parents, may be the sole cause of a person developing a disease. In the past, some litigants especially on the plaintiff's side would assume that a mesothelioma patient must have had some exposure to asbestos; otherwise there would be no other explanation for the development of the disease. Now science has offered another theory. The possibility that mesothelioma developed as the result of a mutated BAP1 gene should be explored, especially in cases where clear asbestos exposure evidence is lacking. As a matter of course, parties to an asbestos litigation should perform a thorough discovery of family history early in the case to see whether the plaintiff is a possible carrier of a genetic cause of mesothelioma.

Looking Ahead

Asbestos litigation remains an area of law where new studies are tested routinely, new legal theories are argued, and new law is developed. Thus, despite the fact that we have been litigating asbestos case for decades, and many thought we would have seen an end by now, litigators in the field, like myself, must continue to keep abreast of recent developments. A good attorney should be ready to approach her or his case with an open mind toward utilizing both tested strategies as well as trying new approaches.