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We Make The Complex Simple

Uncertainty Surrounding FELA Releases — Circuit Split Leads to Contradictory Applications

By Jason P. Eckerly

The breadth of releases executed under the Federal Employers' Liability Act, 45 U.S.C § 51 et seq. ("FELA" or the "Act") continues to be a point of contention between courts and practitioners. FELA was enacted to enable injured railroad workers to overcome a number of traditional defenses to tort liability that had previously operated to bar their actions. The Act abolished the doctrine of assumption of risk, applied comparative rather than contributory negligence, and sought to prevent employers from contracting out of FELA liability.

FELA explicitly voids any contract attempting to exempt an employer from liability created by FELA, stating:

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Welcome

The purpose of the *Toxic Tort Newsletter* is to present the latest information to our readers on scientific studies, court rulings, regulatory matters and new legislation that affects the world of toxic tort litigation. We hope that the information we provide helps you stay on the cutting edge of our field.

This issue reports on numerous court rulings that will affect how we handle this litigation and also reports on new updates on bisphenol A (BPA) and trichloroethylene (TCE). Feel free to call on us for further information regarding these topics or matters you might like to see discussed in our newsletter.

We wish you all a safe and happy new year.

- Edward J. McCambridge

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> Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void. 45 U.S.C. § 55 ("Section 5").

The broad wording of this Section 5 has led to questions of interpretation, especially with respect to releases entered into in settlement of employee lawsuits, including claims alleging diseases caused by exposure to asbestos.

Relatively recently, the Third and Sixth Circuit Courts of Appeals heard cases involving the allowable breadth of releases under FELA. The Circuits reached different conclusions as to the allowable breadth as it relates to preempting future lawsuits. The Circuit split has caused a problem of interpretation for state courts which has recently arisen in asbestos-related lawsuits. This article will first explore the differences between the Third and Sixth Circuits' opinions regarding the allowable breadth of releases under FELA. The article will then explore how this Circuit split has played out in terms of asbestos releases in State courts.

Babbitt v. Norfolk & Western – Bright Line Rule

In *Babbitt v. Norfolk & Western Ry. Co.*, 104 F.3d 89 (6th Cir. 1997), former railroad employees brought claims for damages for hearing loss based on exposure to excessive noise levels during the course of their employment. Plaintiffs had previously left their employ at Norfolk & Western as part of a Voluntary Separation Plan ("Plan"). The Plan provided employees early retirement, a lump sum payment, and continuation of health and other benefits. For their part, the employees executed a Resignation and Release that discharged Norfolk from any claims, known or unknown, arising out of their employment.

The issue presented to the Sixth Circuit was whether Section 5 prohibited Norfolk from absolving itself of liability for FELA claims through the execution of such a general release. The Sixth Circuit ruled the Norfolk release was void. The Sixth Circuit held that "where there exists a dispute between an employer and employee with respect to a FELA claim, the parties may release their specific claims as part of an out-of-court settlement without contravening the Act." *Id.* at 93. However, "where the release was not executed as part of a specific settlement of FELA claims, [Section 5] precludes the employer from claiming the release as a bar to liability." *Id.* Thus, in order for a release to be valid it "must reflect a bargained-for settlement of a *known claim for a specific injury*, as contrasted with an attempt to extinguish potential future claims the employee might have arising from injuries known or unknown by him." *Id.* (Emphasis added). Thus, the Sixth Circuit established what is known as the "bright line" approach to determining if FELA releases are valid – a release is only valid for the specific injury complained of and cannot extend beyond that specific injury to any other conditions that may develop.

Wicker v. Consolidated Rail – Fact Intensive Approach

The Third Circuit disagreed with the Sixth Circuit's interpretation of Section 5 and formulated a different approach. In *Wicker v. Consolidated Rail Corp.*, 142 F.3d 690 (3rd Cir. 1998), former Consolidated employees brought separate actions under FELA for injuries allegedly sustained from exposure to toxic chemicals. The employees had all brought prior claims against Consolidated for various injuries. In settlement of these prior claims, each employee had executed a release absolving Conrail from liability for all claims, both past and future, relating to their employment.

Essentially the same issue was before the Third Circuit – whether Section 5 prohibited Consolidated from absolving itself of liability for FELA claims through the execution of such a general release. For different reasons, the Third Circuit held the Consolidated releases were void. The Third Circuit first considered what it saw as the "bright line rule" set forth in *Babbitt* – limiting the release to those injuries known to the employee at the time the release is executed. While finding that the advantage to this approach was the benefit of predictability, the court recognized that "both employee and employer could fully comprehend future risks and potential liabilities and, for different reasons, want an immediate and permanent settlement." *Id.* at 700. Taking this into consideration, the court held that "a release does not violate Section 5 provided it is executed for valid consideration as part of a settlement, and the scope of the release is limited to those risks which are known to the parties at the time the release is signed." *Id.* at 701. In the court's view, "a release that spells out the quantity, location and duration of potential risks to which the employee has been exposed . . . allowing the employee to make a reasoned decision whether to release the employer from liability for future injuries of specifically known risks does not violate Section 5 of FELA." *Id.*

The Third Circuit held that a release under FELA is "strong, but not conclusive, evidence of the parties' intent." *Id.* The court was "wary of making the validity of a release turn on the writing alone because of the ease in writing detailed boiler plate agreements." *Id.* The written release was not to be conclusive. Rather, courts must undertake a fact-intensive process to determine if a release subject

to FELA is valid. Applying this new standard, the Third Circuit held that the Consolidated releases were void. The Court did not believe the releases demonstrated that the parties understood, let alone addressed or discussed, the scope of the claims being waived or that the plaintiffs had been made aware to the potential health risks to which they had been exposed.

Thus, the Third Circuit established what is known as the fact intensive approach to determining if FELA releases are valid, in which courts must assess the validity of a release in light of the parties' actual known risks. The different approaches developed by the Third and Sixth Circuits left state courts to determine which approach to follow. New York and Michigan State Courts have since faced this issue in asbestos lawsuits.

State Courts' Resolution of the Circuit Split

New York - *Oliverio v. Consolidated Rail*

In *Oliverio v. Consolidated Rail Corp.*, 14 Misc.3d 219, 822 N.Y.S.2d 699 (Sup. Ct. Erie Co. 2006), the New York Supreme Court (Erie County) had to determine which of the two appellate courts offered a more sound analysis of Section 5. Plaintiff had previously brought suit in 1996 based on alleged asbestos exposure and, in resolving that case, had executed a release. Plaintiff brought suit against Consolidated a second time, claiming that he had contracted bladder cancer as a result of asbestos exposure.

The New York court first determined whether the language of the release should be judged by the bright line rule set forth in *Babbitt* or the fact intensive approach set forth in *Wicker*. While the court agreed that the *Babbitt* approach would be easier to apply, it viewed the court's perspective on how parties compromise claims as unrealistic. It feared that this approach would lead to a more complicated inquiry into the nature of the injury or have an overall chilling effect on settlements:

> If a new claim were permitted for each and every new manifestation of the asbestos exposure, regardless of the extent of the parties' awareness of such risks, there would be no incentive on the part of the railroad defendant to ever compromise such claims. *Id.* at 222.

The court instead adopted the *Wicker* approach. In the court's view, *Wicker* offered a more realistic approach in that it allowed for:

> the enforcement of the release for not only the specific injuries already manifested at the time of its execution, but also any risks of future injury which the parties specifically contemplated in its execution, so long as those risks are properly within the ambit of the claim compromised. *Id.*

The release from plaintiff's 1996 claim specifically included all cancer and fears of cancer. In negotiating this settlement, plaintiff had to know that he was compromising based on his claimed exposure to asbestos and any future claims based upon the same exposures. *Id.* Likewise, Consolidated "had a reasonable expectation of finality with respect to the specific claim of asbestos exposure, and the settlement paid was likely to have been based upon that expectation." *Id.* at 223. Thus, the court found that the 1996 release was enforceable and dismissed the case.

Michigan - *Jaqua v. Canadian National*

The Michigan Court of Appeals is the most recent court to weigh in on the issue. In *Jaqua v. Canadian Nat'l R.R, Inc.*, 274 Mich. App. 540, 734 N.W.2d 228 (Mich. Ct. App. 2007), plaintiff originally brought claims against Canadian National alleging that his exposure to asbestos-containing products while an employee caused his asbestosis. In settlement of this initial claim, plaintiff executed a release acknowledging that his pulmonary and respiratory injuries might worsen in the future and voluntarily waived and released all associated claims. Among the conditions expressly listed in the release was cancer.

Plaintiff was later diagnosed with lung cancer and filed a new complaint against Canadian National based on his new lung cancer diagnosis. Canadian National sought to dismiss this new claim based upon the release previously executed. Thus, the Michigan appellate court was faced with the same question as the Third and Sixth Circuits – whether Section 5 only permits a release of known injuries that exist at the time of the release or whether Section 5 permits the release of known risks of future conditions.

The Michigan Court of Appeals adopted the approach set forth by the *Wicker* Court and held that the initial release barred the new lung cancer claim. The court analyzed the bright line rule set forth in *Babbitt* and deemed the holding to be overly broad. In contrast, the court maintained that *Wicker* is "consistent with Section 5 . . . without unnecessarily broadening or narrowing the scope of the rule." *Id.* at 555. Analyzing the case pursuant to the *Wicker* approach, the court determined that the initial release was a valid settlement and not an attempt to escape liability. "The release addressed a specific instance of disputed liability and specific injuries that Jaqua suffered, or was at great risk of suffering in the

future – asbestosis and lung cancer." *Id.* at 556. Having addressed these risks, the release was enforceable.

Conclusion

While most courts will likely adopt the *Wicker* approach, defense counsel must caution clients entering into releases based upon FELA. If a court were to use the *Babbitt* approach in a claim based upon asbestos exposure, a release would only dispense of the exact injury complained of. For example, a release for damages related to asbestosis could not be used to prevent a new claim from being brought if the same plaintiff were to develop lung cancer. To the extent that the *Wicker* approach would apply, defense counsel would be well-served to include language within the release that sets forth all ailments allegedly caused by exposure to asbestos.

Short of Congress or the U.S. Supreme Court resolving this issue, all defense counsel advising clients entering into releases subject to FELA should be wary of the pitfalls and uncertainty that exists in this unsettled area of law.

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News on TCE and BPA

Study Shows Alleged Link Between TCE and Parkinsonism – John A. LaBoon

A study conducted by University of Kentucky researchers and published in the *Annals of Neurology* suggests that workers who were exposed to trichloroethylene (TCE), an industrial degreaser, may have a higher risk of developing Parkinsonism, a group of nervous disorders with symptoms similar to Parkinson's disease. (Plaintiffs exposed to welding rods have made similar claims. *See:* TTN Vol 6, #2 "Welding Fume Litigation: Claims Fabricated From Thin Air?") The study examined thirty patients with Parkinsonism or Parkinson's disease who had been exposed to TCE between eight to thirty-three years. The authors admitted that the paper is not a large-scale epidemiological study, but believe that the results demonstrate a potential link between TCE and Parkinsonism.

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BPA Update – John A. LaBoon, Victoria Ott Keith, and Scott W. Henry

Bisphenol A (BPA) is a chemical used primarily in the production of polycarbonate plastics and epoxy resins. The primary source of exposure for most people is through their diet. BPA can be leached into food and drinks from the internal epoxy resin lining in cans as well as plastic bottles.

As previously reported, the National Institute of Health Services through the National Toxicology Program ("NTP") issued a draft 68-page report on April 14, 2008 (*See:* TTN, Vol 9, #12). In the draft report, the NTP addressed the health implications of BPA on pregnant women, fetuses, infants and children. The peer review deadline was June 11, 2008. The final report was released in September 2008. The report is 320 pages and will be fully reviewed in the next issue of the *Toxic Tort Newsletter*.

Recently, three other BPA-related events have occurred. First, on August 14, 2008, the U.S. Food & Drug Administration (FDA) issued a draft assessment of the risks of BPA in food containers. The draft stated, "The FDA has concluded that an adequate margin of safety exists for BPA at current levels of exposure from food contact uses."

In August, several BPA class action lawsuits were consolidated and transferred to the U.S. District Court for the Western District of Missouri for MDL 1967

coordination under Judge Ortrie D. Smith. Several other matters pending in California, Arkansas, Illinois, Kansas, Missouri, Ohio and Washington were not transferred but are considered potential tag-along cases. Judge Smith is a native Arkansan, University of Missouri at Kansas City graduate, and President Clinton appointee.

Third, a study evaluating whether BPA is related to obesity was published in the August 14, 2008 volume of *Environmental Health Perspectives*, a monthly journal of peer-reviewed research and news on the impact of the environment on human health published by the National Institute of Environmental Health Sciences (NIEHS). The authors concluded that BPA at environmentally-relevant doses inhibited the release of a hormone that protects humans from a metabolic syndrome, thereby increasing susceptibility to obesity-associated diseases.

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California Adopts Sophisticated User Doctrine in Products Liability Case

By Gregory N. Harris

In April 2008, California joined the growing list of jurisdictions recognizing the sophisticated user exception to a manufacturer's duty to warn users of potential dangers of its products. The plaintiff in *Johnson v. American Standard, Inc.*[1] was a trained heating, ventilation and air conditioning (HVAC) technician, claiming to have developed pulmonary fibrosis due to defendant's failure to warn him that welding refrigerant lines containing the refrigerant R-22 could create phosgene gas, inhalation of which can cause potentially fatal lung disease. In addition to his several years of work experience, plaintiff had completed a one year training program in HVAC and held several certifications, including an EPA "universal" certification.[2] Evidence adduced during discovery demonstrated that, beginning in 1997, every time plaintiff bought R-22, he "received, and sometimes read, an MSDS" (material safety data sheet) that explained the risks associated with R-22.[3] Lower courts dismissed the case on the grounds that plaintiff, as an HVAC technician, could reasonably be expected to know the hazards associated with welding refrigerant lines, obviating defendant's duty to warn of the hazards. The California Supreme Court upheld the ruling and confirmed the sophisticated user exception as a defense to products liability lawsuits in California.

California law holds manufacturers strictly liable for injuries caused by a failure to warn of dangers known to be inherent in using their products.[4] Thus, manufacturers are obligated to provide warnings of known risks to afford product users the option of avoiding the product, or taking steps to minimize the risk of injury. Courts in some jurisdictions have declined to apply the sophisticated user exception in strict liability cases, holding it applicable only in negligence cases. The *Johnson* court however, emphasized that the exception is applicable to both strict liability and negligence cases because the crucial determination in both is causation.

Under the sophisticated user exception, a manufacturer has no duty to warn if it reasonably believes that the user will realize the dangerous aspect or nature of a product. Put another way, there is no duty to warn if a manufacturer has a reasonable basis to believe that lack of a warning will not be the cause of any injury to the expected user. The theory underlying the sophisticated user exception is that a failure to warn a party of a danger of which it was already independently aware cannot be the proximate cause of injury resulting from that danger since, already being aware of the danger, the party presumably would have chosen the same course of action if warned.

As the *Johnson* court explained, the exception is intended as an objective standard. Accordingly, the exception turns on what a user of certain training and experience "should have known," based on that training and experience, rather than a subjective assessment of what each user actually "did know" in spite of that training and experience. "In other words, even if a user was truly unaware of a product's hazards, that fact is irrelevant if the danger was objectively obvious."[5] As the court observed, "individuals who represent that they are trained or are members of a sophisticated group of users are saying to the world that they possess the level of knowledge and skill associated with that class. If they do not actually possess that knowledge and skill, that fact should not give rise to liability on the part of the manufacturer."[6] Because the sophisticated user exception is an affirmative defense, defendants will be required to offer proof that a user should have known of the dangers of a product by virtue of training, experience, or job/certification requirements, and when they should have known it.

An interesting element in the *Johnson* decision is the court's reference to an earlier set of consolidated federal court decisions applying California law to claims against manufacturers supplying asbestos-containing material to the U.S. Navy and attempting to use the sophisticated user exception to avoid liability.[7] The court notes, with apparent approval, the federal court's observation that under California law, a manufacturer who supplied asbestos-containing material to the Navy, a "sophisticated user," is not completely absolved from liability, because the Navy's failure to warn employees of the dangers of asbestos was reasonably foreseeable. Although this distinction may initially seem contrary to the rule espoused in *Johnson*, the manufacturer is required to warn *end users* of product dangers. The sophisticated user defense is an exception to that rule, based on an assumption that certain end users, by virtue of learning and experience, are aware of related dangers. In the federal case cited, the Navy was "sophisticated," but it was not the end user. Rather, the end users were individuals employed by the Navy; it was these end users to whom the manufacturer owed a duty to warn. The manufacturer could not avoid liability by delegating its duty to warn to the Navy, without reasonable assurance that it would be done. Although the defendant manufacturer argued that the Navy was a sophisticated user, its argument made was more akin to a learned intermediary argument.[8]

Cases involving an intermediary distributor/supplier are often distinguishable from those involving a true learned intermediary, such as a doctor, because whereas a doctor's ethical and legal obligations to inform patients of risks and alternatives to medications support a reasonable expectation that he will provide such warnings, not all suppliers (e.g., the Navy) are under such an obligation. The touchstone of any defense claiming an exception to the duty to warn is whether, considering who will be using the product, it is reasonable not to include a warning. In this regard, the *Johnson* court observed that, "'[n]ot all warnings . . . promote user safety. Requiring manufacturers to warn their products' users in all instances would place an onerous burden on them and would 'invite mass consumer disregard and ultimate contempt for the warning process.'"[9] The court's pronouncement of a public policy rationale for recognizing the sophisticated user exception in California is prescient and in line with the modern trend toward increased acceptance of the defense, which will likely gain ground in more jurisdictions in the future.[10]

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[1] 74 Cal.Rptr.3d 108 (2008).

[2] "'Universal' certification is the highest certification an HVAC technician can obtain from the EPA, and it allows those certified to work on, and purchase, refrigerant for large commercial air conditioning systems." *Johnson*, 74 Cal.Rptr.3d at 112 (citing 40 C.F.R. secs 821.154(m), 82.161 (2007)).

[3] *Id.*

[4] Although California courts recognize the distinction between negligence and strict liability causes of action, in the context of cases alleging a failure to warn, there is little practical difference.

[5] *Johnson*, 74 Cal.Rptr.3d at 120.

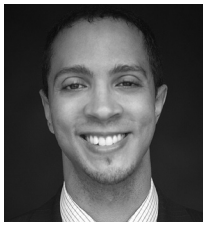
[6] *Id.* at 118.

[7] *In re Related Asbestos Cases*, 543 F. Supp. 1142 (N.D. Cal. 1982).

[8] The learned intermediary exception absolves a manufacturer of liability when an intermediary exists which is in a better position to warn the end user of product risks. The product supplier or manufacturer can therefore be discharged of its duty to warn the end user by instead warning the learned intermediary.

[9] *Johnson*, 74 Cal.Rptr.3d at 119 (internal citations ommitted).

[10] *See, e.g.*, Jeffrey W. Kemp and Lindsy Nicole Alleman. *The Bulk Supplier*, *Sophisticated User*, and *Learned Intermediary Doctrines Since the Adoption of the Restatement (Third) of Torts*. 26 Rev. Litig. 927 (2007).



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Putting a Value on Grief — Amendment to Illinois Wrongful Death Act Expands Damages

By Micah R. Inlow and Paige N. Gates

Damages recoverable under the Illinois Wrongful Death Act, 740 ILCS 180/2, have been expanded to include emotional components that, until now, juries were instructed not to consider. House Bill 1798, signed into law on May 31, 2007, allows jurors to award emotional damages to a decedent's spouse or next of kin. The amendment, which applies to causes of action accruing on or after May 31, 2007, changes the Act to now read:

> In every such action the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death, including damages for grief, sorrow, and mental suffering, to the surviving spouse and next of kin of such deceased person.

This change to Illinois law eliminates a key argument for defense lawyers in wrongful death actions who were previously able to limit certain information and evidence presented to the jury simply because it was not admissible.

In addition to adding damages to the Act, the amendment also provides that any amount reduced from a contributorily negligent beneficiary's shares of damages should be distributed to the other beneficiaries in proportion to their respective degrees of dependency. Prior to the amendment, reductions based on contributory fault were not paid to anyone. Under the new law, a dependent's award is based on the "degree of dependency," which will be determined at a hearing before the trial judge. Lastly, the amendment deletes language regarding limitations on the amount of damages for deaths occurring in 1967 or before. The Act originally limited the amounts that juries could award a plaintiff for "pecuniary injuries" to $5,000. Through the years, the Illinois legislature continued to increase the amount recoverable and, in 1967, did away with any limitation on recovery for pecuniary damages. However, juries remained limited statutorily on the amount they could award if the decedent passed away prior to 1967. House Bill 1798 eliminates this limitation entirely.

Expanding the Act

The Act, enacted in 1853, created a right of action for surviving next of kin to recover damages resulting from decedent's death. ILL. REV. STAT. ch. 70, §§ 1-2.2. Traditionally, the Act only allowed recovery for pecuniary damages, precluding claimants from recovering for their bereavement. The Act reflected the social conditions of the nineteenth century when children were valued for their capacity to contribute to the family income. Primarily a farming society, Illinois followed the "pecuniary loss rule" that wrongful death was measured by financial contributions. Wrongful death acts were created to compensate for a decedent's economic value rather than emotional injury.

Almost a century after the Act became law the Illinois Supreme Court defined a pecuniary injury to be an injury capable of being measured by some standard. Its purpose was to differentiate between quantifiable losses, such as loss of income, and those indeterminable losses arising from the society and companionship shared with the decedent. The Court reasoned that no pecuniary value could be assigned to loss of society and companionship. *See, e.g., Howlett v. Doglio*, 402 Ill. 311, 83 N.E.2d 708 (1949). Despite this clarification, no standard was devised by which the pecuniary loss could be precisely determined. Accordingly, the jury was left to calculate the damages with reference to a reasonable expectation of benefit from the continuance of life. *See, e.g., Ritthaler v. City of Chicago*, 304 Ill. App. 151, 26 N.E.2d 150 (1st Dist. 1940).

Notwithstanding the apparent narrow limitations the legislature implemented with regard to damages recoverable under the Act, Illinois courts consistently interpreted "pecuniary injury" rather broadly. For example, a child has long been able to recover damages for loss of instruction and moral, physical and intellectual training as "pecuniary injuries." *See Goddard v. Enzler*, 222 Ill. 462, 78 N.E. 805 (1906). This compensation was not limited to the child's minority and included the reasonable expectation of future benefits from the father during the child's adult life. *See Allendorf v. Elgin, J. & E. Ry.*, 8 Ill. 2d 164, 133 N.E.2d 288 (1956). Even though courts

broadened the scope of a "pecuniary injury," the Illinois legislature neglected to amend the pecuniary injury limitation. Illinois continued to adhere to the pecuniary loss rule that a person's value is measured by financial contributions.

In the early 1980s, however, the Illinois Supreme Court recognized certain non-economic damages that a claimant could recover under the Act, and included these damages in the pecuniary injury definition. In one landmark case, *Elliott v. Willis*, 92 Ill. 2d 530, 442 N.E.2d 163 (1982), plaintiff asked the trial court to instruct the jury that, in assessing damages, it "consider the reasonable value of the society, companionship and conjugal relationship that [plaintiff] had with her husband and which she had been deprived of because of his death." *Id.* at 534. On review, the Illinois Supreme Court considered whether loss of consortium is compensable as a pecuniary injury under the Act. The court relied on its previous decisions in both *Hall v. Gillins*, 13 Ill. 2d 26, 147 N.E.2d 352 (1958) and *Knierium v. Izzo*, 22 Ill. 2d 73, 174 N.E.2d 157 (1961), where it reasoned that the remedies sought were not significantly different from the statutory remedy available under the Act. In *Hall*, a child and widow brought a common law action alleging deprivation of the support, companionship, guidance, advice and affection of the father and husband. Similarly, in *Knierim*, a widow brought an action for loss of consortium resulting from the death of her husband. The court reiterated its words in *Hall* to address the loss of consortium issue: "'[t]he term 'pecuniary injuries' has received an interpretation that is broad enough to include most of the items of damage that are claimed by the plaintiffs in this case.'" *Knierim*, 22 Ill. 2d 73 at 82 (internal citation omitted).

In holding that loss of consortium was compensable as a pecuniary injury under the Act, the *Elliott* court reasoned that "[s]ince we have said that the felicity and care of a father are capable of evaluation as 'pecuniary injuries' under [the Act], we are compelled to conclude that the companionship and conjugal relationship of a spouse are equally compensable as 'pecuniary injuries.'" *Elliott*, 92 Ill. 2d at 538. The court further noted that as a decedent's professional worth in terms of future earnings can be measured with precision and particularity, so too can damages for loss of a husband's society, companionship and sexual relations be measured. Additionally, the court acknowledged that "[a]ll of the elements that comprise what is considered to be loss of consortium may not be the most tangible items, but a jury is capable of putting a monetary worth on them." *Id.* at 540. In reaching this conclusion, the court stated that "[t]he purpose of [the Act] is to compensate the surviving spouse and next of kin for the pecuniary losses sustained due to the decedent's death [and it] is intended to provide the surviving spouse the benefits that would have been received from the continued life of the decedent." *Id.*

Following its decision in *Elliott*, the Illinois Supreme Court continued to expand the scope of pecuniary injury to encompass non-monetary losses. In *Bullard v. Barnes*, 102 Ill. 2d 505, 468 N.E.2d 1228 (1984), the court held that parents are entitled to a presumption of pecuniary injury from the loss of a deceased child's society and companionship in a wrongful death action.[1] The antiquated presumption of loss of earnings was replaced with a presumption of pecuniary injury based on the loss of the child's society. The court noted that "the presumption that parents derive significant financial benefits from their children bears little, if any, resemblance to modern family life . . . ." *Id.* at 516. Although the presumption of loss of earnings no longer applied, the court stated that recovery could be obtained where it was proven that the child earned income used to support the family. *Id.* at 517. Furthermore, the court stated that the loss of a child is distinguishable from the loss of a spouse or parent in that neither children nor spouses bear the same heavy financial responsibility for either their parents or spouse that a parent automatically assumes upon the birth of a child. *Id.* at 517-18. Therefore, in computing damages, the court held "that for a wrongful death verdict to accurately reflect the parents' pecuniary injury, juries must be instructed not only to assign a dollar value to the loss of the child's society, but also to arrive at a figure, based on the evidence presented to them, which represents expenditures the parents would have been likely to incur had the child lived." *Id.* at 518. The court instructed that "[j]urors should be directed to deduct these projected child-rearing expenses from any award for loss of society and any proved loss of income." *Id.* The holdings reached in *Elliott* and *Bullard* gave jurors greater responsibility to consider a family member's loss of society. Still, recovery for grief, sorrow or mental anguish remained unrecoverable.

Shortly after the Illinois Supreme Court's decisions in *Elliott* and *Bullard*, the Third District pushed the traditional boundaries further and reasoned that if a parent may maintain an action for the loss of society of an adult child, then conversely, an adult child should be allowed to maintain an action for the loss of society of a parent. *See Keeling v. Keeling*, 133 Ill. App. 3d 226, 478 N.E.2d 871 (3rd Dist. 1985). The Illinois Supreme Court also broadened the class of potential plaintiffs who could recover under the Act by holding that a proven loss of a sibling's society is a pecuniary injury for which siblings may recover under the wrongful death statute. *See In re Estate of Finley*, 151 Ill. 2d 95, 601 N.E.2d 699 (1992). Interestingly, the Court noted

that while the First and Second Districts allowed siblings such an opportunity, the Fourth District disagreed with this position and barred all siblings from the opportunity of proving loss of society as a pecuniary injury. *Id.* at 103. The Seventh Circuit Court of Appeals, however, agreed with the Fourth District and held that adult siblings were not permitted to recover for the loss of another adult sibling. *See Moruzi v. McDonnell Douglas Corp.*, 771 F.2d 338 (7th Cir. 1985). Accordingly, the courts remain split on this issue and the Illinois Supreme Court has chosen not to review the decisions of the appellate courts. *See Pruitt v. Jockisch*, 228 Ill. App. 3d 295, 591 N.E.2d 942 (4th Dist. 1992), appeal denied, 146 Ill. 2d 651, 602 N.E.2d 475 (1992); *see also Schmall v. Village of Addison*, 171 Ill. App. 3d 344, 525 N.E.2d 258 (2nd Dist. 1988), appeal denied, 122 Ill. 2d 594, 530 N.E.2d 264 (1988).

While the courts have been willing to expand the scope of the "pecuniary injury" definition to include seemingly non-economic damages, they have not allowed recovery of punitive damages in wrongful death actions. *See Gardner v. Geraghty*, 98 Ill. App. 3d 10, 423 N.E.2d 1321 (1st Dist. 1981). Consistent with previous holdings, the most recent amendment to the Act did not expand the damages recoverable to allow for recovery of punitive damages. Regardless, the Act is not the exclusive remedy available to a plaintiff for tortious injuries resulting in death. *Murphy v. Martin Oil Co.*, 56 Ill. 2d 423, 308 N.E.2d 583 (1974). Therefore, while not allowed in wrongful death cases, punitive damages may be recoverable under another theory of liability in the same cause of action.

Amendment Spurs Debate on Future Wrongful Death Actions

The amendment to the Act ends a delicate balancing act played between the judge, plaintiff and defense lawyer in terms of what evidence is allowed or not allowed in measuring loss of society. Plaintiff attorneys no doubt welcome the change as it allows them the opportunity to present evidence specifically on the grief, sorrow and mental suffering of a parent, spouse or other family member. These emotional aspects associated with the death of a loved one now have a place in the courtroom. The amendment allows jurors, who have until now been instructed to disregard certain emotional factors, to base their damages award on plain sympathy for the plaintiff. In effect, proponents believe that the new law allows a jury to fairly assess the true loss sustained by family members in wrongful death actions.

Any confusion jurors may have had in the past in terms of what exactly loss of society includes may now be avoided. Jurors no longer have to distinguish love, compassion and affection lost as a result of the death from the survivor's grief and sorrow over the death. Furthermore, plaintiff attorneys will be given more freedom to present evidence on how the death has affected the survivor. Attorneys will no longer walk a fine line when presenting evidence of loss of society. While some trial judges have previously allowed a certain level of evidence of grief and sorrow, the amendment allows plaintiffs to be more direct in presenting emotional arguments regarding the claimant's loss of society.

Playing on the sympathies of jurors could also affect the size of damage awards in wrongful death cases. Plaintiff attorneys can consider introducing expert testimony to develop the grief, sorrow, sadness and depression in an effort to help bolster the award. Contrary to this expected benefit, some plaintiff attorneys argue that the revised law could see little change in the damage awards as juries' most likely considered grief, notwithstanding the jury instruction, when compensating for the death of a loved one.

Wrongful death cases involving the elderly or young children could see the greatest increase in damage awards. When dealing with the elderly or very young, damages are generally low as there is little medical expense and no loss of income or support. As a result, it was not always economically feasible to bring a wrongful death cause of action. The largest component of damages may very well be the grief, sorrow and mental anguish the family suffers as a result of the death. Therefore, the amendment to the Act is likely to increase the class of plaintiffs seeking recovery.

While the amendment is advantageous to a plaintiff's ability to present evidence on loss of society, defense attorneys are feeling less protection on the issue of damages. As modifications to compensable damages under the Act continued throughout the 1980s and 1990s, the results proved unfavorable for the medical industry.[2] Rising verdicts in personal injury and medical malpractice cases, along with a decline in the number of physicians practicing in some areas of Illinois, led to tort reform in 2005. Public Act 94-677 capped the amount a plaintiff could recover for non-economic damages to $500,000 per doctor and $1 million per hospital. Despite the recent amendment to the Act, the cap on non-economic damages remains in place.

Defense lawyers are concerned that the damages now recoverable under the Act will lead down the "slippery slope." Allowing juries to award damages for the grief, sorrow and mental anguish of a surviving spouse and/or next of kin could drastically increase the amounts awarded in Illinois wrongful death verdicts. Additionally, allowing

the jury to consider the survivor's grief or mental anguish will likely divert the jury's attention from the legal issues and cause them to focus on the sympathy aspects of the case when determining the amount to award. Therefore, the jury may be more likely to award damages based on the sympathy and emotion elicited from the plaintiff instead of listening to the law and basing their decision on the evidence and legal aspects of the case. Furthermore, the new amendment seemingly contradicts the purpose of the 2005 tort reform legislation.

In the coming months, lawyers, physicians and insurance providers will be keeping a close watch on a recent constitutional challenge to the 2005 damage cap. The 2006 case, *LeBron v. Gottlieb Memorial Hospital, et al.* (Cook Co: 06 L 12109, Nov. 13, 2007), is the first challenge to the state law cap on non-economic damages in medical malpractice verdicts. Cook County Circuit Court Judge Diane Larsen ruled that limiting pain and suffering awards, the non-economic damages for medical malpractice, is unconstitutional. On November 13, 2007, Judge Larsen ruled that Public Act 94-677 violates the Separation of Powers Clause of the Illinois Constitution as an improper exercise of legislative power.

Judge Larsen based her ruling on *Best v. Taylor Mach. Works*, 179 Ill. 2d 367, 689 N.E.2d 1057 (1997) where the Illinois Supreme Court overturned a compensatory caps law. In her opinion, Judge Larsen noted that the Court had determined that a cap on non-economic damages violates the separation of powers in the state Constitution and "disregards the jury's careful deliberative process in determining damages that will fairly compensate injured plaintiffs who have proven their causes of action." *LeBron* (quoting Best at 414). Furthermore, Judge Larsen stated:

> In finding that the cap on non-economic damages 'unduly encroaches upon the fundamentally judicial prerogative of determining whether a jury's assessment of damages is excessive within the meaning of the law,' [the Illinois Supreme Court] expressly noted that 'the cap on damages is mandatory and operates wholly apart from the specific circumstances of a particular plaintiff's noneconomic injuries. *Id.*

The issue will now go to appeal in the Illinois Supreme Court which has struck down similar damage caps in the past. If the non-economic damage award cap is overturned, medical malpractice insurers will be vulnerable once again to excessive verdicts and settlements.[3] Allowing juries to award damages for grief, sorrow and mental anguish may, in effect, contradict the very purpose of the 2005 tort reform legislation.

As the court noted in *Elliott*, the purpose of the Act was to compensate the surviving spouse and next of kin for the pecuniary losses sustained due to the decedent's death, and to provide the surviving spouse with the benefits that would have been received from the continued life of the decedent. *See Elliot*, 92 Ill. 2d at 540. However, as the damages recoverable under the Act were expanded in *Bullard* to include loss of consortium, juries were forced to make their decisions by disregarding any consideration of the impact the death had on the survivors emotionally. It would seem that the emotional aspects of the death of a loved one went hand-in-hand with the claims for loss of society and/or consortium. With the new amendment, juries will consider grief and mental anguish as one element of damages and decide the value of the loss of society as a separate element. The question remains as to whether adding this new element will cause verdicts and/or settlements to skyrocket, or whether juries will split the award normally given when they were only able to consider the loss of society. The problem created by this amendment is that no parameters or guidelines have been set in place to determine the value or worth of an individual's grief or mental anguish. Accordingly, a jury is seemingly free to award monetary amounts based solely on the fact that the emotion or grief espoused by one plaintiff instilled more sympathy in the hearts of the jury than did another. Until such guidelines are put into place, the effect the revision may have on future verdicts will have to be measured on a case-by-case basis.

Both plaintiff and defense attorneys await the impact this new class of damages recoverable in wrongful death cases will have on future verdicts. Defense attorneys contend that the change will open the flood gates to allow verdicts to soar and plaintiffs to essentially escape recent caps on awards instituted to combat this very problem. Conversely, plaintiffs' attorneys welcome the change and juries' newfound ability to consider grief and sorrow felt to be evidence of loss of society. Plaintiffs' attorneys no longer have to tread lightly when presenting evidence of loss of society and consortium and, therefore, can elicit evidence of how the loss has affected the mental state of the plaintiff. Notwithstanding the fact that the judicial system has effectively defined "pecuniary injury" to include non-economic damages, the 2007 amendment to the Act is the first time the legislature expressly expanded the pecuniary damages limitation to allow for recovery of non-economic damages.[4]

[1] Prior to the court's decision in *Bullard*, recovery for the loss of society of a child was not allowed in wrongful death actions. *See Kaiserman v. Bright*, 61 Ill.App.3d 67, 69-70, 377 N.E.2d 261, 263-64 (1st Dist. 1978); *see also Trotter v. Moore*, 113 Ill.App.3d 1011, 1016, 447 N.E.2d 1340, 1344 (2nd Dist. 1983).

[2] Beginning in the 1980s, Illinois recognized damages under the Act for loss of society for spouses, parents, children and siblings. *See e.g. In re Estate of Finley*, 151 Ill. 2d 95 (1992) (a sibling may recover for the loss of society resulting from the death of another sibling); *Seef v. Sutkus*, 205 Ill.App.3d 312, 582 N.E.2d 606 (1st Dist. 1990) (a parent may recover for the loss of society resulting from the death of a stillborn child); *In re Estate of Keeling*, 133 Ill.App.3d 226 (1985) (a child may recover for the loss of society resulting from the death of a parent).

[3] Of note, this past October a DuPage County jury awarded a record $12 million to plaintiff, a boy who suffered brain damage at birth. Of the $12 million, $1.5 million was for "non-economic" damages. The injury happened in 1999, before the Illinois law capping non-economic damages was in effect.

[4] Illinois now becomes the 24th state to allow recovery of damages for grief, sorrow and mental anguish in wrongful death cases. The other twenty-three states are Alaska, Arizona, Arkansas, Colorado, Delaware, Florida, Hawaii, Kansas, Louisiana, Maine, Maryland, Montana, Nevada, North Dakota, Ohio, Oklahoma, South Carolina, Texas, Utah, Vermont, Virginia, Washington and West Virginia.

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State Law Updates

LOUISIANA – Victoria Ott Keith

***Seaman v. Seacor Marine LLC*, No. 07-3354 (E.D.La) (July 24, 2008)**

Plaintiff filed claims against his employer under the Jones Act and general maritime law, alleging he contracted bladder cancer as a result of workplace exposure to numerous toxic and hazardous chemicals while working as a captain of several vessels. Judge Jay Zainey of the U.S. District Court for the Eastern District of Louisiana granted defendant Seacor's motion for summary judgment on causation grounds, finding that plaintiff's medical expert Dr. Perri Prellop testified only that plaintiff was at increased risk of developing bladder cancer. The Court held that plaintiff's expert opinion, based on only two journal articles, was insufficient as a matter of law to establish causation since Dr. Prellop "did not provide any reliable indication of what levels of exposure are necessary to cause bladder cancer in humans or whether plaintiff was exposed to the chemicals at sufficient levels."

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MARYLAND – Benjamin D. Whetzel

***Reiter, et al. v. ACandS, Inc., et al.* (Md. Ct. Special App., May 6, 2008)**

Summary judgment was entered in Baltimore City Circuit Court on behalf of three manufacturers of crane brake equipment in three asbestos personal injury lung cancer cases. The Maryland Court of Special Appeals affirmed the judgment in each case concluding that the testimony proffered by plaintiffs was insufficient to meet the state's substantial factor causation test set forth in *Eagle-Pitcher Industries v. Balbos* (326 Md. 179, 1992).

The Court pointed to the factors outlined in *Balbos* which evaluate whether exposure to a supplier's product will be sufficient to permit a finding of substantial factor causation, including the "frequency of its use, the

proximity, in distance and time, of a plaintiff to the use of a product, and the regularity of the exposure of that plaintiff to the use of that product." The Court also noted that *Balbos* had rejected the "fiber drift theory" by stating in that opinion: "So extremely attenuated is causation in fact under the 'fiber drift theory' that it is inconsistent with the requirement of Maryland law that an actor's negligence be a substantial factor in causing the injury."

Here, co-worker testimony described the plaintiffs working in the vicinity of overhead cranes and the dust created by the operation of those cranes. However, in two of the three cases, there was no testimony as to whether this dust resulted from the wear of crane brake linings or as to the identity of the suppliers of the brake linings. The Court ruled that this evidence was not enough to support a finding of substantial factor causation.

In the third case, Square D Company was identified in deposition testimony as a supplier of brakes used on cranes at the plaintiff's worksite. However, the Court noted that "there was no testimony that Square D was the exclusive supplier of crane brakes" at the facility. In addition, the Court recognized that "there were approximately a dozen different manufacturers' crane brake assemblies used" at the jobsite. "To infer from that information that Mr. Reiter was exposed to Square D brake linings that were expelling respirable asbestos fibers with the proximity, regularity, and frequency required by *Balbos* would be speculation, at best," the Court stated. "Square D simply cannot be found liable for Mr. Reiter's lung cancer without evidence linking his exposure to dust generated by the wear of Square D brake linings." The Court concluded that finding otherwise "would amount to a recognition of the theory of market share liability, which the Maryland Court of Appeals has declined to adopt."

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MISSISSIPPI – Victoria Ott Keith

***Watts, et al. v. Radiator Specialty, et al.*, No. 2006-CA-01128-SCT (Miss. Sup. Ct., June 12, 2008)**

The Mississippi Supreme Court affirmed the trial court's grant of defendant's motion for judgment notwithstanding the verdict, stating that the plaintiff's expert "failed to meet *Daubert* muster" because he relied on only cohort and case control studies to prove causation.

The Court held that none of the studies cited by plaintiff's expert Barry Levy, M.D. provided a sufficient legal basis upon which to establish a causal connection between benzene exposure and plaintiff's disease of non-Hodgkin's lymphoma. The jury had returned a $2,000,000 verdict for the plaintiff in 2004.

***LeBlanc, et al. v. Chevron USA Inc., et al.*, No. 07-30599 (5th Cir., April 23, 2008)**

The Fifth Circuit Court of Appeals reversed and remanded a case dismissed by the Eastern District of Louisiana on causation grounds. The plaintiff claimed that his myelofibrosis was caused by exposure to benzene, which occurred during his thirty years of work as a tanker truck driver delivering benzene-containing products. Plaintiff's expert Frank Gardner, M.D. testified that plaintiff's disease was caused by benzene exposure. The Court held the testimony was unreliable based on Daubert grounds since it was based on a draft report by the federal Agency for Toxic Substances and Disease Registry (ATSDR). However, during the appeal, the report became finalized. The Fifth Circuit held that the new evidence should be carefully considered in determining whether the expert testimony is sufficiently reliable.

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NEW JERSEY – Lisa Wildstein

***Varo v. Owens-Illinois, Inc.*, _A.2d_, 2008 WL 2174349 (N.J.Super.A.D. 2008)**

In a watershed decision, fifteen Spanish citizens were permitted by a New Jersey Court of Appeals to sue Owens-Illinois in New Jersey for alleged asbestos exposure to Owens-Illinois' Kaylo products manufactured in New Jersey. The Spanish plaintiffs claim they contracted asbestosis from working aboard U.S. Navy and Coast Guard warships that were docked at United States-Spanish military installations in Spain between 1950 and 1988. Plaintiffs presumably chose to sue in the United States due to a workers' compensation bar under Spanish law.

The trial court held that based upon the doctrine of *forum non conveniens*, it would be too inconvenient and therefore pose an undue hardship for Owens-Illinois to defend itself in the court chosen by plaintiffs. The Court of Appeals overturned the trial court's dismissal of plaintiffs' claims on various grounds: 1) the trial judge failed to consider plaintiffs' position and where they would like the matter to be heard; 2) U.S. warships, as opposed to civilian ships, are considered U.S. territory, regardless of their location; 3) plaintiffs' exposure occurred onboard the ship, and thus in U.S. territory; 4) because Owens-Illinois manufactured Kaylo in New Jersey for many years, plaintiffs had substantial contacts with New Jersey; and

5) Owens-Illinois had failed to prove that Spain was an adequate alternative forum.

New Jersey Consolidation of Asbestos Cases
All New Jersey asbestos matters were consolidated in Middlesex County, New Jersey. Consequently, New Jersey asbestos litigation will now be overseen by Judge Ann G. McCormack.

Judge McCormack has been revising the General Order Governing Asbestos Litigation in Middlesex County. She has been working with "a cross section" of plaintiffs and defense counsel on the Asbestos Advisory Committee. Judge McCormack has ruled that: 1) only summary judgment motions relating to product identification will be given summary judgment filing and return dates; 2) all other motions will be addressed closer to the time of trial following the submission of a pre-trial report (akin to the Federal Court practice); 3) all cases will be tried within three years from the date of filing; 4) there will now be two tracks for managing cases: the Special Master will manage all cases currently trial listed and Judge McCormack will manage all newly filed matters; 5) it is mandatory that a Notice of Appearance of Medical Counsel be filed to preserve any medical defense; and 6) both plaintiff and defense standard interrogatories will be re-written and made more site-specific.

***Fackelman, et al. v. Lac d'Amiante du Quebec, LTEE*, No. A-4636-05T1 (N.J. Super. Ct., App. Div.)**
The Superior Court of New Jersey, Appellate Division, recently held that a third party performing industrial hygiene studies and sampling at the facility where the plaintiffs worked owed no duty to warn plaintiffs about the dangers of asbestos. Plaintiffs sued Aetna (their employer Owens Corning Fiberglas Corp.'s workers' compensation insurer) because it entered into a contract with OCF to conduct industrial hygiene studies at the plant where plaintiffs worked. Additionally, plaintiffs sued the non-insurance defendants for supplying asbestos-containing products to OCF. The trial court granted Aetna's summary judgment and the Appellate Court affirmed that decision.

The Appellate Court held on multiple grounds that absent allegations and evidence of negligence, Aetna owed no duty to warn plaintiffs of potential asbestos dangers. First, although Aetna provided the results of its studies to OCF, it was not responsible or liable for what OCF chose to do with those results. Second, the court found no factual basis to support the proposition that Aetna increased plaintiffs' risk of harm. Third, Aetna had no control over the OCF facility and could not force OCF to implement any protocols or halt operations. Finally, the court held that plaintiffs were not third-party beneficiaries of the contract between OCF and Aetna.

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NEW YORK – Maria Carlucci

***Drabczyk v. Amchem Products, Inc.*, Index No. 2005/1583 (N.Y. Sup. Ct. Erie County January 18, 2008).**
In this mesothelioma case, the Court addresses plaintiff's refusal to disclose the bankruptcy proof of claims that plaintiff filed against bankrupt companies' trusts.

Plaintiff's arguments for non-disclosure of the bankruptcy proof of claims focused on three theories. First, the claim forms were not discoverable because they were offers of settlement. Second, the claim forms contained only vague and general information. Last, any details included in the claim forms were previously disclosed.

The court looked to the New York Civil Practice Law and Rules (CPRL) for guidance in determining disclosure of the proof of claims. CPRL § 3101(a) requires full disclosure of all matter material and necessary in an action – regardless of the burden of proof. This statute is construed liberally, requiring the disclosure of *any* facts bearing on the controversy that will assist in trial preparation. The *Drabczyk* court reasoned that, even if the bankruptcy trust proof of claims were inadmissible evidence, the claims must still be disclosed. The Court found that even if a proof of claim was employed to encourage settlement, the admissions of fact therein were admissible.

The Court also turned to other New York decisions regarding this issue. It found that disclosure of proof of claim forms was previously addressed in two other decisions, which ordered the production of all claims filed by or on behalf of a plaintiff – *Malcolm v. A.W. Chesterton Co.*, Index No. 2002/10666 (N.Y. Sup. Ct. Erie County December 30, 2005) and *Negrepont v. A.C.&S., Inc.*, Index No. 2001/120894 (N.Y. Sup. Court New York County December 18, 2003). The court noted that, in *Negrepont*, Justice Freedman found that while the proof of claims were partially settlement documents, they were also presumably accurate statements of facts pertaining to plaintiffs' asbestos exposure. Therefore, any factual statements about such exposure should be made available to the remaining defendants.

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PENNSYLVANIA – Melissa Fallah

***Wright v. Aventis Pasteur, Inc.* - Philadelphia Court Rules Product Liability Suit Against Vaccine Manufacturer is Preempted by the Federal Vaccine Act**

In *Wright v. Aventis Pasteur, Inc.*, a Philadelphia court recently ruled that the federal National Childhood Vaccine Injury Act (the "Act") governing liability of drug vaccine manufacturers expressly preempts state tort liability claims. This product liability action arose after eleven-year-old Jared Wright developed autism spectrum disorder. His parents, Jacqueline and Howard Wright, filed suit in state court alleging that Jared's exposure to the preservative thimerosal, in conjunction with his MMR vaccine, caused his disorder.

Judge Arnold L. New affirmed his decision granting summary judgment in favor of defendant Aventis Pasteur, Inc., Merck & Co., and Wyeth and held the plaintiffs' design defect and failure to warn claims were expressly preempted by the Act.

In 1986, Congress created the Act as a means to ensure vaccine safety and create a compensation system for citizens who have adverse reactions to vaccines. This no-fault system is an alternative to the traditional forum of filing a tort cause of action, and tries to ensure an adequate supply of vaccines while providing relief to those injured by a vaccine. The Act protects manufacturers from civil liability and encourages vaccines to be used, administered and developed. An alleged defective design claim would be compensated under this no-fault system.

The issue in *Wright* is the interpretation of 42 U.S.C. Section 300aa-22(b)(1). It reads:

> No vaccine manufacturer shall be liable in a civil action for damages arising from a vaccine-related injury or death associated with the administration of a vaccine after October 1, 1988 if the injury or death resulted from side effects that were unavoidable even though the vaccine was properly prepared and was accompanied by proper directions and warnings.

The vaccine defendants argued that plaintiffs' design defect claims are barred by Section 22(b) of the Act. Defendants construed this section of the Act to impose a total bar on design defect claims arising from vaccine-related injuries so long as the vaccine was produced in accordance with the Food and Drug Administration (FDA) approved specifications.

Plaintiffs disagreed with defendants' construction of the Act and argued it only bars design defect claims if the side effects are determined, on a case-by-case basis, to be unavoidable. They argued defendants have the burden of proof to show the use of thimerosal is unavoidably safe.

Judge New stated "Congress clearly intended when it enacted the Vaccine Act to exercise its constitutionally delegated authority to preempt all state design defect claims without case-by-case determination if the side effects are unavoidable." A case-by-case determination of whether a vaccine was unavoidably safe would defeat the Vaccine Act's purpose and its protection to manufactures. To support his ruling, Judge New cited two similar decisions out of the U.S. District Court for the Eastern District of Pennsylvania, *Sykes v. Glaxo-SmithKline* (2006) and *Bruesewitz v. Wyeth* (2007).

The *Wright* opinion holds that manufacturers may obtain preemption under the Act by providing evidence of compliance with the federal FDA vaccine regulations. Plaintiffs can only overcome this presumption by evidence showing that the vaccine manufacturer engaged in fraud or wrongful withholding of information from the FDA prior to approval, wrongfully withheld information related to vaccine's safety after its approval, or failed to exercise due care even though the manufacturer complied with federal laws or regulations.

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PENNSYLVANIA – Robert Coleman

Asbestos Litigation, Certain Asbestos Friction Cases Involving Chrysler LLC, October Term 1986 No. 0001, (Phila Court of Common Pleas, September 24, 2008)

Judge Allan Tereshko's long-awaited ruling on a *Frye* challenge to plaintiff's experts by Chrysler has finally been issued. Judge Tereshko ruled that plaintiff's experts may not utilize a theory that "each and every breath" is a causative factor in developing an asbestos-related illness. The motion was filed in August 2007 and the Court heard five days of testimony. In reaching his conclusion, Judge Tereshko found plaintiff's the theory is based upon "an illusion of methodology." After a lengthy analysis the Court held:

> Plaintiffs here presented a maze of evidence in an attempt to support their experts' opinions. Within this maze, no recognizable methodology was found. The written reports were bald conclusions which contained no process or procedure detailing how the conclusions were reached or what supporting material or analyses were employed in the process. The

> testimonial evidence, although more lengthy and complicated, failed to establish that there was any methodology employed and how such (if it existed) was used to arrive at the respective conclusions. The mere mention of methodologies, *i.e.* chemical structure analysis, animal studies without a detailed explanation of how such was used in arriving at certain conclusions, produces scientifically incoherent opinions based upon scientifically incoherent methodologies and such are not generally accepted in the relevant scientific community.

In reaching its conclusion, the Court rejected the expert testimony of Richard Lemen, Ph.D., William Longo, Ph.D., Dr. Arthur Frank and Dr. Eugene Mark.

In arriving at his decision, Judge Tereshko adopted the language of Judge Klein in the *Summers v. Certainteed Corp.* 886 A2d 240 (Pa Super 2005) finding that accepting each and every fiber as a significant contributing factor is akin to believing that "if one took a bucket of water and dumped it into the ocean, that was a substantial contributing factor to the size of the ocean."

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TEXAS – John A. LaBoon

In Re: *Hutson, Reddick, Washington & Hunter* (Tex. App. -- Houston [1st Dist.] August 28, 2008)

This mandamus arose after Texas Asbestos MDL Judge Mark Davidson ordered separate trials before separate juries on the issue of statute of limitations. Defendants had filed motions for summary judgment in multiple cases arguing that plaintiffs' claims were barred by limitations. Plaintiffs responded that the "discovery rule" tolled the limitations period until plaintiffs knew or should have known that their alleged malignancies were asbestos-related. Judge Davidson found that a fact issue existed related to the discovery rule and plaintiffs' due diligence in discovering the cause of their injuries, and ordered separate trials on the limitations issue. Plaintiffs filed a mandamus which the Court of Appeals denied. Plaintiffs filed a Motion for Rehearing on September 11, 2008.

***Merck & Co. v. Ernst* (Tex.App -- Houston [14th Dist.], May 29, 2008)**

In this Vioxx case, Merck appealed a substantial trial verdict in favor of plaintiff ($234.4 million jury award, $26.1 million judgment) and argued that the evidence was legally insufficient to support plaintiff's allegations that Vioxx caused a blood clot which caused death. It was undisputed that a clot was not found at autopsy. Plaintiff's experts opined that the clot could have dissolved or been dislodged when CPR was performed on Mr. Ernst. The Court held:

> The epidemiological evidence supports the conclusion that Vioxx use at a certain dose and duration is associated with an increased risk of thrombotic cardiovascular events. The experts' speculation that a clot could have existed, but could have dissolved, been dislodged, or fragmented gives rise to nothing more than conjecture.

The Court of Appeals reversed the judgment and rendered a take-nothing judgment. Plaintiff's Motion for Rehearing is pending.

***Merck & Co. v. Garza* (Tex.App. -- San Antonio May 15, 2008)**

In another Vioxx case, Merck appealed the trial verdict. The decedent had a history of pre-existing heart problems and plaintiff's expert admitted that he was a "high-risk patient." Merck appealed on the basis of lack of causation. The Court held:

> Although plaintiffs were not required to establish specific causation in terms of medical certainty, nor to conclusively exclude every other reasonable hypothesis, because Mr. Garza's pre-existing cardiovascular disease was another plausible cause of his death, the plaintiffs were required to offer evidence excluding that cause with reasonable certainty. *See Merrell Dow*, 953 S.W.2d at 720. We do not believe plaintiffs met their burden.

The Court entered a take-nothing judgment. Plaintiff's Motion for Rehearing is pending.

***Union Carbide Corp. v. Loftin* (Tex.App. – Beaumont, June 12, 2008)**

Six plaintiffs' personal injury and wrongful death claims against 100 companies were transferred from Orange County because the plaintiffs had not established venue was proper against all of the defendants as there was no evidence that the claims "arose out of the same transaction, occurrence, or series of transactions or occurrences." It was uncontested that one defendant, DuPont, had a principal office in Jefferson County. Plaintiffs had claimed that they suffered from "indivisible injuries" related to exposure to a variety of chemicals, including: benzene, naptha, toluene and xylene. However, the Court noted that plaintiffs did not plead adequate facts and had not

alleged the "same occurrence/transaction" provision in their petition. Thus, the claims against defendants that plead an alternative venue were transferred to various jurisdictions including Harris, Tarrant, Dallas and Travis Counties. Plaintiffs have filed an appeal with the Texas Supreme Court.

***Clark v. Kellogg Brown & Root*, (E.D. Tex., Sept. 23, 2008)**

Judge J.T. Wood awarded $3.2 million after a bench trial in a benzene-related case tried under maritime law. Plaintiff alleged that he contracted Acute Myelogenous Leukemia ("AML") as a result of alleged benzene exposure while working on barges owned by Brown & Root between 1972-1986. Judge Ward issued findings of fact and conclusions of law wherein he held that plaintiff had established general and specific causation through expert testimony provided by doctors, an epidemiologist and an industrial hygienist.

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Segal McCambridge Singer & Mahoney, Ltd. was founded in 1986 and has grown to having offices in Chicago, Illinois; Austin, Texas; Philadelphia, Pennsylvania; New York, New York; Baltimore, Maryland; Princeton, New Jersey; Jersey City, New Jersey and Detroit, Michigan. It represents a wide variety of clients in products liability, medical malpractice, professional liability, public official liability, construction litigation, general defense and toxic tort defense. The founding partners' experience in toxic tort cases dates back to the 1970's in pesticide and asbestos litigation. Today, the firm acts as national coordinating counsel in asbestos litigation to numerous companies including Garlock, Anchor Packing, Congoleum, Weil-McLain, Durametallic, DAP and Chicago Fire Brick. The firm also acts as national trial counsel for these and others in asbestos litigation. The philosophy of Segal McCambridge has remained the same since its inception: provide state-of-the-art legal services with an extraordinary level of responsiveness and personalized attention to each client and each case.

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