
The National Forum for Environmental & Toxic Tort Issues (FETTI)

Sprina 2011 Case Law Update Newsletter

The following summaries consist of recent environmental and toxic tort case law updates divided into three regions: East Coast, Midwest and West Coast. Please feel free to contact me should you like to submit an article for the FETTI Fall 2011 Case Law Update Newsletter.

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Spring 2011 Case Law Update Newsletter
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EAST COAST CASE LAW UPDATE

Recent Events in the Asbestos MDL 875

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The Federal Court has cored all asbestos toxic tort matters nationally, into the Eastern District Court for Pennsylvania (in Philadelphia), under its MDL 875 program. In a recently completed, first ever, MDL 875 asbestos trial, before Presiding Judge Robreno, Schumacher v. American Biltrite, Inc., et al., No. 10-1627 (E.D. Pa. 2010), the jury returned a complete defense verdict. Originally filed in Philadelphia County State Court, with trial in April 2010, once the last non-diverse defendant was dismissed during jury selection, the case was removed to Federal Court (and placed into the MDL 875). At the time of the MDL 875 trial, the only remaining defendants were Azrock Industries and John Crane. Trial lasted two and one-half weeks. Plaintiff claimed his mesothelioma was caused by exposure to asbestos in a variety of settings, including exposure to asbestos in floor tiles while working for a flooring company in high school, and while serving aboard a ship in the U.S. Army. Defendants made several arguments: their products only contained low levels of asbestos, plaintiff was exposed to other asbestos products that caused his disease (amosite insulation on the ship and insulation from boilers plaintiff worked with for a period of 4 – 5 months), and that plaintiff had not actually worked with defendants' products (whether plaintiff had even worked at the floor tile company), and that products were not on the ship on which plaintiff worked. This result may make many plaintiffs push to remand to their original state transferor courts for trial, rather than risk trial in the Federal Court asbestos MDL 875 program.

In another very recent asbestos MDL 875 matter, the judge permitted late production of plaintiff's expert reports. Magistrate Judge Angell allowed the late reports, ruling that the prejudice to defendants was not irreversible. Bohannon v. CSX Transportation, et al., No. 09-74483 (E.D. Pa. 2010). Ford Motor Company had moved for Summary Judgment, due to

plaintiff's failure to produce expert reports. In response, plaintiff then produced reports of Drs. Frank and Castleman. The reports were admittedly late and not produced until after Ford's Motion had been filed. In response to the late reports submission, Ford filed a Motion to Exclude the testimony of Drs. Frank and Castleman, arguing they were untimely and failed under F.R.C.P. 26(a)(2)(B). The Court ruled any concerns on compliance with the Rules of Civil Procedure (and *Daubert*), could be raised after the doctors were deposed, and also, that exclusion of evidence was an "extreme sanction", only used for willful deception or a flagrant disregard of a Court Order (examining the factors set forth in *Meyers v. Pennypack*, 559 F.2d 894 (3d Cir. 1977), to determine if exclusion was appropriate: (1) prejudice or surprise to opposing party, (2) ability to cure prejudice, (3) extent late evidence would disrupt orderly and efficient trial, and (4) bad faith or willfulness in failing to comply with district court's order). Magistrate Angell ruled exclusion inappropriate, specifically finding that the second and third factors weighed against exclusion, because the Magistrate had allowed deposing of the doctors, and *Daubert* challenges, if appropriate; and further, that plaintiff's failure to produce was not willful or in bad faith (simply "inadvertent", due to the large volume of cases filed by plaintiff's law firm). Despite finding that the *Meyers* factors did not warrant exclusion, Magistrate Angell did order plaintiff to pay reasonable legal fees and expenses incurred by Ford in filing its Motion for Summary Judgment and its Motion for Preclusion. This result demonstrates that judges in the asbestos MDL 875 continue to give plaintiff/plaintiff's counsel every possible opportunity to pursue their cases, despite a fairly clear lack of "technical" compliance with the Federal Court Rules.

All Is Not Quiet on the Western Front – Spilman Thomas & Battle, PLLC's Battle Group Reports on Recent Decisions in the 4th Circuit and West Virginia

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Perrine v. E. I. du Pont de Nemours and Co., 694 S.E.2d 815 (W. Va. 2010).

On March 26, 2010, the Supreme Court of Appeals of West Virginia issued a landmark decision in *Perrine v. E. I. du Pont de Nemours and Co.* In *Perrine*, plaintiffs brought a class action as the result of the defendant's operation of a zinc smelter facility in Harrison County, West Virginia. Plaintiffs alleged exposure to arsenic, cadmium, and lead. Plaintiffs were awarded over \$381 million by a jury as damages for soil and structural remediation, medical monitoring, and punitive damages. While the majority opinion spans in excess of one hundred pages and touches on a litany of issues, the court's treatment of medical monitoring and the admissibility of expert testimony warrant particular attention.

The *Perrine* court upheld the jury's verdict awarding medical monitoring damages *despite* the fact that plaintiffs offered no evidence to prove the relative comparison between the plaintiffs' exposure to hazardous substances with that of the general public. In fact, during trial, the plaintiffs' own expert testified that exposure to lead outside the class areas was as great, if not greater, than that within the class. As noted by Justice Ketchum in his dissent, however, the majority opinion was legally flawed inasmuch as the jury was not required to find that plaintiffs were *significantly* exposed in relative comparison to the general population. *Accord Rhodes v. E. I. du Pont de Nemours and Co.*, 2008 WL 2400944 (S.D. W. Va. June 11, 2008) (requiring plaintiffs to prove "significant exposure to a proven hazardous substance" on a claim for medical monitoring). Furthermore, plaintiffs were not required to establish that they were at a *significantly* increased risk of contracting a serious latent disease, a ruling that is further at odds with the Southern District of West Virginia's application of West Virginia's medical monitoring law. *See Rhodes v. E. I. du Pont de Nemours and Co.*, 657 F. Supp. 2d 751 (S.D. W. Va. 2009).

Notably, the *Perrine* court echoed its prior disapproval of the argument that medical monitoring should be rejected due to its risk of harm to a plaintiff. Somewhat perplexingly, the *Perrine* court concluded that the requirement that a diagnostic testing regimen must be medically advisable does not necessarily preclude a scenario where such a determination is based (even if only in part) on a plaintiff's desire for information concerning the state of his health – a conclusion that would seem to permit testing *even though* such testing poses a danger to a plaintiff. Importantly, and in a holding that cleared up years of ambiguity since a cause of action for medical monitoring was initially recognized in West Virginia, the *Perrine* court concluded that punitive damages may not be awarded on a cause of action for medical monitoring.

The *Perrine* court further held that in making the threshold ruling on the admissibility of expert testimony, circuit courts should err on the side of admissibility. Applying that principle, the Supreme Court of Appeals affirmed the trial court's ruling that allowed expert testimony on medical causation – specifically, that smelter dust caused cancer and other diseases – from a witness that did not have any education, training, or experience in medicine, epidemiology, or human toxicology. Plaintiffs' causation expert (who had previously been excluded from giving similar testimony in an Oklahoma district court) was a soil scientist with a degree in agronomy and experience working with the USEPA on risk assessment studies of metal uptake of plants (not humans) from the soil. In his dissent, Justice Ketchum challenged the propriety of letting plaintiffs' soil expert testify on medical causation in support of plaintiffs' medical monitoring claims – "[t]his soil scientist should not have been allowed to opine as to diseases caused by [the defendant's] dust. The trial court essentially allowed [plaintiffs' expert] to become an 'uber-juror.'" *Accord Rhodes v. E. I. du Pont de Nemours and Co.*, 253 F.R.D. 365 (S.D. W. Va. 2008) (finding that expert testimony from toxicologist and epidemiologist did not support certification of medical monitoring class).

Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.,
2011 WL 18368 (4th Cir. Jan. 5, 2011)

In *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, the United States Court of Appeals for the Fourth Circuit took up the issues of associational standing for environmental torts, the pre-suit notice requirement for a citizen suit under the Federal Clean Water Act

("CWA"), and a plaintiff's ability to recover for past violations under the CWA. Beginning in 1995, Gaston treated contaminated storm water at its facility in South Carolina and released the treated water into Lake Watson, which in turn flowed into the North Fork of the Edisto River. Gaston's NPDES permit contained two phases of effluent limits – Phase II was effective from June 1, 1992 until the permit expired. Gaston requested an extension of time to comply with Phase II, but the extension was not granted until March 1993. In July 1993, the plaintiff association sent Gaston a notice of its intent to sue under the CWA, citing specific violations, general violations, and past violations. Suit was filed in 1994.

During a series of appeals and remands, the Fourth Circuit and district court concluded that (i) one of the plaintiff association's members operated a business leading canoe trips on the Edisto River; (ii) the canoe trips began upstream of the confluence of the North Fork and the Bull Swamp Creek, went through the confluence, and continued downstream; (iii) the member was forced to reduce the number of trips to the confluence because of runoff and discharges by Gaston; and (iv) pollutants discharged by Gaston were found at the confluence and more than 105 miles downstream.

On appeal, the *Gaston* court noted that a plaintiff association is not required to show environmental harm to establish the injury in fact necessary for Article III standing; rather, only that one of its members had an injury in fact by virtue of actually having used the area affected by the alleged activities of Gaston, not "an area roughly in the vicinity." Because the plaintiff association's member used the areas of the Edisto River allegedly polluted by Gaston's discharges for his canoe trip business, the court concluded that the plaintiff association had standing through its member.

Applying Supreme Court precedent dealing with the pre-suit notice requirement under the RCRA by analogy, and considering the intent behind the CWA (i.e., to provide administrative agencies an opportunity to act, or an alleged violator time to comply with its permits), the *Gaston* court concluded that compliance with the pre-suit notice and delay provisions of the CWA were a mandatory condition precedent to a citizen suit. Furthermore, inasmuch as sufficient notice must be given to an alleged violator to allow it to correct such violations and avoid a citizen suit altogether, a number of the plaintiff association's general allegations in its pre-suit notice were deemed insufficient and therefore barred. The *Gaston* court ultimately concluded that, because recovery under the CWA may not be had for "wholly past violations" of a permit, imposition of penalties for such violations was in error.

Nezan v. Aries Technologies, Inc., 2010 WL 4674266 (W. Va. Nov. 17, 2010)

In *Nezan v. Aries Technologies*, the Supreme Court of Appeals of West Virginia addressed the issue of personal jurisdiction under West Virginia's long arm statute, W. Va. Code § 56-3-33, and principles of federal due process. In 2008, a Canadian-owned plane crashed in Virginia. The pilot and his only passenger were Canadian residents and citizens. The plane took off from Canada with a final destination of the Bahamas. After taking off from Canada, the plane stopped in Buffalo, and then, due to inclement weather, made an unplanned stop at Yeager Airfield in

West Virginia for less than a day. The pilot refueled, filed an Instrument Flight Rules plan (although he was not certified with an instrument rating), and decided to continue flying to the Bahamas. Shortly after take-off, the pilot requested permission to drop to a lower altitude because of airframe icing. The plane crashed in Virginia shortly thereafter.

The passenger's estate brought a wrongful death action in the Circuit Court of Kanawha County. The pilot's estate moved to dismiss citing, among other reasons, a lack of personal jurisdiction. The circuit court found that it lacked personal jurisdiction over the defendants – specifically, the court found that the cause of action arose in Virginia when the plane crashed (and everyone onboard was killed), and that but-for the unplanned stop, it was not foreseeable that the Canadian defendants could be (much less would be) haled into a West Virginia court.

On appeal, the Supreme Court of Appeals reversed. When reviewing a dismissal based upon a lack of personal jurisdiction, the *Aries* court noted that its inquiry was two-fold – first, whether the West Virginia long arm statute was satisfied, and second, whether there were sufficient minimum contacts to satisfy federal due process. The court concluded that that the plaintiff's complaint made a *prima facie* showing of personal jurisdiction – specifically, that a series of negligent decisions by the pilot *while* in West Virginia caused the tortious injury (here, death) to the passenger. Turning to federal due process, the *Aries* court concluded that sufficient minimum contacts existed to allow jurisdiction to attach. While the pilot's time in the state was admittedly brief, the cause of action for wrongful death arose in West Virginia (even though the death occurred in another state), the pilot had purposefully availed himself of West Virginia's airport facilities (albeit as the product of an “unplanned” stop), and the pilot's allegedly negligent decisions while in West Virginia led directly to the passenger's death.

**New York's Decision on Statute of Limitations Extension for Latent Injuries
Caused by Exposure to Toxic Substances¹**

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New York's highest court interpreted a statute of limitations savings clause for latent exposure to toxic substances.² The Court first addressed how much time constitutes “latent.” In *Giordano v. Market America*, the Court held “latent” could include “[a] condition that exists only [for] hours...even a few hours latency to justify the extension of the statute of limitations....”

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² *Giordano v. Market America*, ___ N.Y.3d ___, 2010 WL 4642451(November 18, 2010).

Giordano next considered the statute’s requirement plaintiff establish “technical, scientific or medical knowledge,” to “ascertain” the cause of plaintiff’s injury, had not been “discovered, identified or determined,” prior to the expiration of the statute of limitations. The Court held the requirement raised two inquiries: (1) is it plaintiff and his counsel, or the medical community, who must not have possessed the information, and (2) what level of certainty is implicated by the requirement plaintiff could not have “ascertained” the cause of his injury.

The Court held it was not reasonable to require a lay person or its attorney to be the source of expert knowledge. The plaintiffs’ bar had sought an even more lenient rule — they argued the clock started only when scientific knowledge was published in the “non-expert community.” The Court outright rejected plaintiffs’ suggested “publicity test,” and held “we see no unfairness in requiring that injured people who want to protect their rights *seek out expert advice*, rather than waiting for the media to bring a possible cause or injury to their attention” (emphasis added).

Next, the Court held the requirement of not having knowledge necessary to “ascertain” the cause of injury implicated *Frye*’s “general acceptance” test.³

Is *Giordano* A Trap for Plaintiffs?

If some plaintiffs can escape the statute of limitations by claiming the medical community had not reached “general acceptance” as to causation, how can other plaintiffs proceed to trial claiming there is “general acceptance.” Plaintiffs should not have it both ways. Defense counsel should track and confront plaintiffs with their conflicting “general acceptance” causation opinions.

MIDWEST CASE LAW UPDATE

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In many toxic tort cases, there is a long latency period between the exposure to a contaminant and the resulting onset of disease. For example, the latency period between initial exposure to asbestos fibers and the development of mesothelioma is generally thought to be 20 to 50 years. This latency period frequently gives rise to statute of limitations issues that can challenge plaintiffs, defendants, and the courts that are called upon to resolve these questions. Missouri courts have developed a body of case law in which the running of the limitations period is held to commence when the disease is “sustained and capable of ascertainment.” This article will provide a brief overview of the Missouri standard and illustrate some of its features through discussion of two recent U.S. District Court rulings.

³ New York follows *Frye*, and not *Daubert*.

Many jurisdictions use the so-called “discovery” test to determine when a plaintiff’s cause of action accrues in civil actions, including toxic tort cases involving slowing developing diseases.

In general, under the discovery test, a cause of action accrues, and the statute of limitations begins to run, when a plaintiff discovers, or in the exercise of reasonable diligence should have discovered, that a cause of action exists. In Missouri, however, all civil actions, other than those for the recovery of real property, are deemed to accrue when damage is “sustained and capable of ascertainment.” MO. REV. STAT. §516.100. The “capable of ascertainment” test was adopted by Missouri’s legislature in 1919. *Powel v. Chaminade College Preparatory, Inc.*, 197 S.W.3d 576, 581 (Mo. banc 2006). Prior to the 1919 amendment, the statute of limitations began to run on the date the wrongful act or technical breach occurred. *Id.*

It is well established that Missouri’s “capable of ascertainment” test is an objective standard, unlike the discovery test, a subjective standard. In the 1977 case of *Jepson v. Stubbs*, the Missouri Supreme Court expressly rejected the argument that “capable of ascertainment” means when a plaintiff subjectively should have discovered the injury and damages. 555 S.W.2d 307, 312-313 (Mo. banc 1977). However, only recently did the Missouri Supreme Court articulate a generally applicable test to be used in determining when damages are sustained and capable of ascertained as an objective matter, holding in the 2006 case of *Powel v. Chaminade College* that the statute of limitations begins running when the evidence is such to place a reasonably prudent person on notice of a potentially actionable injury. 197 S.W.3d at 582.

The U.S. District Court for the Eastern District of Missouri, applying Missouri’s “capable of ascertainment” test, recently granted summary judgment in favor of defendants on statute of limitations grounds in two cases. In both cases, plaintiffs brought suit against respirator manufacturers alleging that their products caused or contributed to cause the plaintiffs to develop silicosis. The courts held that plaintiffs’ claims were barred by Missouri’s applicable five-year statute of limitations for product liability and personal injury cases as the plaintiffs’ injuries were sustained and capable of ascertainment more than five years before their complaints were filed. In *Midkiff v. 3M Company, et al.*, more than five years prior to the filing of his complaint, the plaintiff received two conflicting diagnoses: one pulmonologist told him that he had silicosis while another pulmonologist told him that he did not. 2010 WL 1687123. However, the plaintiff reported the diagnosis of silicosis to his personal physician and also applied for worker’s compensation based on the occupational injury of silicosis more than five years before filing his complaint. *Id.* The plaintiff argued that his cause of action did not accrue until he learned that a third pulmonologist had diagnosed him with silicosis, which occurred within five years of the filing of plaintiff’s complaint. The court noted that this argument misapplies Missouri’s capable of ascertainment standard as it is not relevant when the plaintiff became convinced of his injury, and granted summary judgment in favor of defendants 3M and Mine Safety Appliances Company. *Id.* at 4.

Similarly, in *Savage v. 3M Company, et al.*, the court granted summary judgment in favor of defendant Mine Safety Appliances Company where the plaintiff’s complaint was filed more than five years after a pulmonologist had diagnosed the plaintiff’s silicosis, even though the plaintiff claimed to be unaware of that diagnosis. 2010 WL 4000620. The court, noting that Missouri has rejected a subjective test for determining when an injury is capable of ascertainment, held that when the plaintiff became convinced of his injury is irrelevant, as the evidence demonstrated that his silicosis was diagnosed more than five years prior to the filing of his complaint. *Id.* at 6.

Notably, in discussing Missouri’s “capable of ascertainment” standard and citing the rule articulated in *Powel*, the *Midkiff* court noted: “A personal injury can be capable of ascertainment at the point of diagnosis. But diagnoses are not always dispositive. Damages may be sustained and capable of ascertainment before a plaintiff learns of his injury or see a physician.” 2010 WL 1687123, 3 (internal citations omitted). This same language was cited by the *Savage* court. 2010 WL 4000620, 5 (internal citations omitted). This language demonstrates what is perhaps the most important distinction between the “discovery” test and the “capable of ascertainment” test in cases involving diseases with a long latency period. In jurisdictions that apply that “discovery” test, a cause of action will not accrue for such injury until the plaintiff knows or reasonably should know of such injury, while in Missouri, a cause of action for such injury could be deemed to accrue without any such knowledge on the part of the plaintiff.

**U.S. Court of Appeals Affirms Exclusion of Plaintiffs’ Causation
Opinions in Pesticide Exposure Case**

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Recently, the Eighth Circuit Court of Appeals affirmed an Iowa based federal district Court decision to exclude plaintiffs’ expert causation opinions which resulted in summary judgment for the defendants. In *Junk v. Terminix International Co.*, ___ F.3d ___, 2010 WL 4978801 (December 9, 2010), plaintiffs alleged that their two months premature child was born with a variety of significant health problems, developmental delay and cerebral palsy as a result of exposure to a pesticide in their home by Terminix. Terminix was retained due to a spider infestation in the family home. The child’s mother was pregnant at the time of pesticide application. Plaintiffs claimed that they inquired as to potential adverse health effects to the unborn child from the pesticide used, Dursban. Plaintiffs alleged they were advised by a Terminix representative that Dursban was safe and would pose no risk to the child. After filing suit in Iowa state court, the defendants removed the case to federal district court.

Plaintiffs proffered a number of experts to opine regarding the adverse health effects of Dursban and its supposed role in causing their child’s multiple problems. Defendants sought to exclude these opinions and also moved for summary judgment. The district court, using the *Daubert* analysis, granted the defendants’ motions to exclude. Further, due to the lack of causation evidence, the court entered summary judgment in the defendants’ favor.

As to the first plaintiffs’ expert, Dr Richard Fenske, the court noted that while otherwise qualified, his admission that he deviated from his typical methodology used in his research and non-litigation work due to lack of data was critical in its finding that the methodology used in this instance was not reliable. Instead, he had simply compared what he knew of the purported exposures here with published studies to conclude the child was exposed to unsafe levels of one of the ingredients of Dursban. The district court had found that he made certain, ungrounded

assumptions in rendering his conclusions. As such, the District Court concluded that Dr. Fenske had not used a scientifically valid means to determine the child's exposure level, and the court of appeals agreed. Next, the court addressed the exclusion of plaintiffs' causation expert, Dr. Cynthia Bearer. Because her causation opinions relied on Fenske's invalid exposure level opinions, the district court had determined that Dr. Bearer had no basis to conclude that the purported exposures here were the cause of the child's health and related problems. Under these circumstances, The court of appeals found Dr. Bearer's causation opinions were, in effect, unsupported speculation and agreed they should be barred.

Given the lack of causation evidence, the Court also affirmed the grant of summary judgment. In so doing, the Court recognized that in this diversity jurisdiction case, state law controlled the issue of causation, and found that the grant of summary judgment here was consistent with the Iowa Supreme Court decision in *Ranes v. Adams Laboratories, Inc.*, 778 N.W. 2d 677 (Iowa 2010). In *Ranes*, the Iowa Supreme Court discussed the need for both general and specific causation ("bifurcated causation") evidence in toxic tort cases. Given the lack of causation evidence here, summary judgment was appropriate.

Illinois Supreme Court Accepts Appeal in "Take Home" Asbestos Exposure Case

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Recently, the Illinois Supreme Court accepted an appeal of *Simpkins v. CSX Corp.*, 401 Ill. App. 3d 1109, 929 N.E.2d 1257 (5th Dist. 2010). In *Simpkins*, the Fifth District Illinois Appellate Court reversed the dismissal of counts of plaintiff's complaint entered by the Madison County, IL circuit court in favor of CSX, the corporate predecessor of the employer of an asbestos exposed employee. The employee's wife, Arnette Simpkins passed away from mesothelioma while the suit was pending, and her estate pursued a wrongful death and survival claim against CSX and others. Simpkins' estate alleged that she contracted mesothelioma as a result of exposure to asbestos on the clothing of her husband who Simpkins claimed was exposed to asbestos during his work for CSX's predecessor company. At the trial court, CSX asserted that as the employer of decedent's husband, it owed no duty under the Federal Employers' Liability Act, 45 U.S.C. §51 et seq., to protect his family members from the dangers of asbestos brought home on the his clothing.

The appellate court, in a case it characterized as one of first impression in Illinois, held that CSX did owe such a duty to the family members of its employee. The court used what it said was ordinary principals of Illinois negligence law to find the existence of this duty. It also looked at how courts in other states had decided this issue. The court commented that there were limits as to just how far such a duty would extend, suggesting it may not extend beyond family members. It found that the concept of foreseeability would establish the outer limits as to whom such a duty would be owed. In this instance, the court found that the notion of the wife of the employee being exposed to whatever was brought home on the employee's clothing was foreseeable.

Simpkins actually not the first such reported Illinois “take home exposure” case involving asbestos. In *Nelson v. Aurora Equipment Co.*, 391 Ill.App.3d 1036, 909 N.E.2d 931 (2nd Dist. 2009), the Second District Illinois Appellate Court affirmed the grant of summary judgment in favor of a premises owner who employed the husband and son of the deceased wife and mother who laundered their work clothing or was otherwise exposed to it. Plaintiff alleged the clothing contained asbestos taken home from work.

While the *Nelson* court appeared somewhat troubled at the prospect of what it saw as a limitless duty, its decision was actually focused on the fact that this was a “premises liability” case. The court noted that duties owed in such circumstances are typically limited to the “entrant” upon the premises or otherwise present on the land. The plaintiff’s decedent, Mrs. Nelson was never on the defendant’s premises. The “condition” plaintiff claimed to be the cause of her death, asbestos, was no longer on those premises when she came into contact with the asbestos. The relationship between the defendant and plaintiff, or in this instance a lack thereof, was key in determining how to apply the typical duty analysis here, and the court’s finding no duty was owed.

The Illinois Supreme Court’s decision in *Simpkins* should bring some clarity in Illinois as to the scope of any duty owed in the context of so called “take home” exposure cases.

WEST COAST CASE LAW UPDATE

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***Stewart v. Union Carbide Corp.* (2010) 190 Cal.App.4th 23**

The California Court of Appeal recently refused to expand the scope of the sophisticated user or intermediary defense. In *Stewart*, Union Carbide was sued as the supplier of asbestos fiber to Hamilton Materials which supplied joint compound used by or near the plaintiff. Union Carbide alleged that Hamilton Materials was a sophisticated user or intermediary of asbestos that knew or should have known of the risks of asbestos, thus relieving Union Carbide of the duty to warn of

the hazards of asbestos. The court held that this defense is actually an extension of the bulk supplier/component parts doctrine which has been previously held to be inapplicable to suppliers of asbestos and that it applies only if the supplier gave adequate warnings to the intermediary. In reaching its holding, the court refused to expand the scope of the California Supreme Court's ruling in *Johnson v. American Standard, Inc.* (2008) 43 Cal.4th 56.

***Collins v. Plant Insulation Company* (2010) 185 Cal.App.4th 260**

The decedent, Ulysses Collins, was exposed to asbestos while working on Navy shipyards for over 30 years. While the Navy specified the use of asbestos products on its shipyards and the decedent was exposed to asbestos from numerous sources at those shipyards, there was evidence that the Navy did not train the decedent to work with or around asbestos. There was further evidence that the Navy failed to warn the decedent about the dangers of doing asbestos work, and also failed to provide the decedent with any respiratory protection. The decedent later died of complications from mesothelioma. The trial court ruled that no fault could be allocated to the Navy because, as a sovereign entity, it was immune from tort liability. However, the Court of Appeal reversed, holding that juries should be permitted to allocate fault to all whose conduct contributed to a plaintiff's injury, including those with immunity from suit. The Court of Appeal distinguished between an entity engaging in conduct that the Legislature has determined is not wrongful and an entity like the Navy with immunity from suit notwithstanding wrongful conduct.

***Taylor v. Elliott Turbomachinery Co.* (2009) 171 Cal.App.4th 564 (and subsequent contradictory cases)**

The component parts defense is under review by the California Supreme Court. In *Taylor*, a former navy member was allegedly exposed to asbestos-containing products used on or near the defendants' equipment which had been manufactured by the defendants for use in ship propulsion systems. However, the asbestos-containing products to which the decedent was allegedly were manufactured and supplied by third parties and not by the defendants. The plaintiffs contended that the use of these asbestos-containing products was foreseeable. The defendants contended that a bright-line distinction should be made whereby only those in the chain of distribution of the asbestos-containing products should be liable. The Court of Appeal favorably analyzed the "chain of distribution" and "component part" defenses and affirmed summary judgment for the defendants, finding that California law imposed no duty on defendants as to the asbestos-containing products manufactured and supplied by third parties. The future of *Taylor's* holdings is now in some doubt. Two subsequent Court of Appeal decisions, *Walton v. William Powell Co.* (April 22, 2010) (following *Taylor*) and *O'Neil v. Crane Co.* (Sept. 18, 2009) (disagreeing with *Taylor*) have been accepted for review by the California Supreme Court.

Oddone v. Superior Court (Technicolor, Inc.) (2009) 179 Cal.App.4th 813

In a secondary exposure case, a decedent's surviving spouse brought a negligence action against her husband's former employer claiming that she was injured as a result of toxic vapors and chemicals brought home by her husband on his clothing and person. The trial court eventually sustained the defendant's demurrer without leave to amend, finding that it owed no duty of care to the plaintiff. The Court of Appeal applied the standards in *Bockrath v. Aldrich Chemical Co.* (1999) 21 Cal.4th 71 that a plaintiff must specify the chemical that caused the injury, must also specify the injury, and must also allege that a result of the exposure the specified toxin entered his body. The Court of Appeal rejected the notion that the fact that plaintiff was claiming injury as a result of secondary exposure made any difference, commenting that it was "even more apropos" to apply the *Bockrath* standards in such cases because the connection between the defendant's acts and the claimed injury is more attenuated than in a primary exposure case. Since the plaintiff failed to meet the *Bockrath* standards, the Court found that several of the factors in *Rowland v. Christian* (1968) 69 Cal.2d 108 did not weigh in her favor and concluded that the defendant did not owe a duty to the plaintiff.