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WHAT'S INSIDE

MARITIME

Fruit company hit with fines for failing to prepare for asbestos trials

By Kenneth Bradley, Esq.

Chiquita Brands International, the famous banana supplier, defending against lawsuits by seamen allegedly exposed to asbestos-containing products onboard its produce transport ships, must pay daily fines of $50,000 for defying a federal judge's order to prepare for trials.

In re Northern Ohio Maritime Asbestos Litigation; Certain Plaintiffs v. United Fruit Co., No. 10-cv-1, 2016 WL 4533012 (N.D. Ohio Aug. 24, 2016).

United Fruit Co., as Chiquita was once called, failed to follow a "clear and unambiguous order" to submit a list of cases it was prepared to try, Judge Dan Aaron Polster of the U.S. District Court for the Northern District of Ohio said in an Aug. 24 order.

The company used its own ships to import bananas from Central and South America to the United States. Plaintiffs filed 341 suits against the company, alleging injury from exposure to asbestos on the ships, according to the order.

United Fruit filed a motion Aug. 18 seeking to amend the court's order to prepare for trials.

REUTERS/Neil Hall

The defendant challenged both the fairness and constitutionality of Judge Polster's Aug. 12 order that said 10 maritime asbestos cases would be tried in November.

The judge ordered the plaintiffs and the defendant each to select five cases to be tried.

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EXPERT ANALYSIS

Scapa Dryer Fabrics, Inc. v. Knight: Addressing the elephant in the room

K&L Gates attorneys David A. Fusco and Stephen A. Hench discuss a recent Georgia Supreme Court decision on the admissibility of expert testimony in asbestos cases that any exposure to asbestos fibers above background level must be considered a substantial contributing factor to the cumulative exposure that causes disease.

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Scapa Dryer Fabrics, Inc. v. Knight: Addressing the elephant in the room

By David A. Fusco, Esq., and Stephen A. Hench, Esq.
K&L Gates

Plaintiffs in asbestos litigation have historically sought to admit expert testimony that every occupational exposure to asbestos contributes to an individual's overall dose and, therefore, is a contributing, or substantial contributing, factor to any later developed asbestos-related disease.

Defendants on the other hand have sought to exclude such testimony on the grounds that it is based on an unreliable methodology for evaluating specific causation because it leads to the conclusion that all exposures are causative without any consideration of the actual circumstances of the exposures alleged.

As a result of defendants' success in making these challenges, it has become increasingly common for plaintiffs to mask deficiencies in an expert's underlying opinion by presenting additional testimony based on a purported consideration of exposure evidence that appears to remedy the evidentiary shortcomings in the expert's testimony. The problem, however, is that the expert's conclusion — which is ultimately being used to persuade the jury — nonetheless remains based on an inadmissible theory of causation.

The Supreme Court of Georgia shed light on the issue in *Scapa Dryer Fabrics, Inc. v. Knight* when, on July 5, 2016, it addressed the admissibility of expert testimony that any exposure to asbestos above background levels must be considered a contributing factor to an individual's cumulative dose and, ultimately, that individual's disease.[1] In doing so, the court concluded that the prejudice from admitting this "any exposure"[2] testimony was not cured by the expert's additional testimony about Mr. Knight's alleged exposures and related scientific evidence regarding dose.

The court focused on the fact that the expert's opinions failed to "fit" Georgia's causation standard and, because the expert failed to qualify his opinions based on the additional testimony, the jury was invited to rely on the expert's improper "any exposure" testimony in determining whether the exposures attributable to Scapa Dryer Fabrics. Inc. ("Scapa") contributed to Mr. Knight's injuries.

> Over the past several years, numerous state and federal courts have addressed the sufficiency of specific-causation testimony in asbestos cases.

Although the court held that the expert's testimony may have been admissible if properly qualified with respect to "a reliable estimate of [Plaintiff's] actual exposure," the decision represents a significant step forward in unmasking plaintiffs' attempts to persuade juries using irrelevant and inadmissible specific-causation opinions.

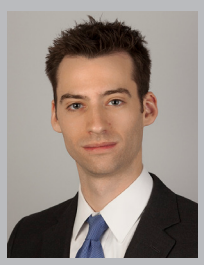
Specifically, the decision illuminates the need for an expert's specific-causation opinion to "fit" the relevant legal-causation standard and the need for courts to examine whether the foundation for an expert's specific-causation opinions is what it is purported to be.

THE 'ANY EXPOSURE' BATTLEGROUND

Over the past several years, numerous state and federal courts have addressed the sufficiency of specific-causation testimony in asbestos cases. In most cases, courts have held that where such testimony is based solely on a variation of the opinion that all occupational exposures above background — regardless of actual dose and without any comparative analysis of the actual exposures — the testimony is inadmissible under *Daubert* and comparable state-court standards.[3]

For example, in *Krik v. Crane Co.*, Plaintiff sought to admit causation testimony from experts Dr. Arthur Frank and Dr. Arnold Brody based on a form of the "any exposure"[4] theory and sought to "have his experts testify that any exposure to asbestos, even the very first one, regardless of dosage, is sufficient to cause asbestos-induced lung cancer."[5] In excluding such testimony, the United States District Court for the Northern District of Illinois recognized:

> The primary basis for the "Any Exposure" theory seems to be that [Plaintiff's] experts cannot rule out that a single dose of asbestos causes injury. From this, they conclude that any and all exposure to asbestos is necessarily harmful. ... This is not an acceptable approach for a causation expert to take.[6]



David Fusco (L) is a partner with **K&L Gates** in its Pittsburgh office and focuses his practice on mass tort litigation. He has tried asbestos cases throughout the country and has argued numerous challenges to the admissibility of expert testimony. **Steve Hench** (R), an associate at the firm, focuses his practice on mass tort and government enforcement matters. Reprinted with permission.

The district court explained that this methodology is inconsistent with controlling law, which rejects the position that "*de minimis* exposure is sufficient" to prove causation and requires evidence of the "frequency, regularity, and proximity" of the exposures at issue.[7]

The court also concluded that the "any exposure" testimony was inadmissible because of the "wholesale failure [of Plaintiff's experts] to base their opinions on facts specific to th[e] case."[8]

In contrast, other courts have admitted specific-causation testimony from experts who admittedly subscribe to a variation of the "any exposure" theory, so long as the expert's opinions were also based on a consideration of the actual alleged exposures and relevant scientific literature.[9]

In *Anderson v. Ford Motor Co.*, for example, Plaintiff initially sought to admit specific-causation testimony from "experts[10] [who] admit[ted] that they d[id] not have any specific information regarding [decedent's] exposure to any of Defendants' products" but rather relied on an every exposure theory to conclude all of decedent's exposures were causative.[11]

The district court went on to hold that the "every exposure theory of causation does not meet the standards set by Rule 702 and *Daubert* and must be excluded."[12]

Plaintiff in *Anderson* was later granted leave to amend her expert disclosures but "was cautioned that 'every exposure theory testimony' would not be permitted."[13] Plaintiff supplemented her disclosures to include Dr. Jerrold Abraham and, in reviewing Dr. Abraham's proposed testimony, the court found his testimony admissible based on his extended report discussing Mr. Anderson's testimony and scientific studies regarding the levels of exposure that lead to an elevated risk of disease.[14]

The court reached this conclusion despite Dr. Abraham testifying at his deposition that "every exposure above background would have been sufficient in itself to cause the mesothelioma. If [decedent] only had one exposure and developed a mesothelioma that would have been sufficient to be the cause."[15] Instead, the court focused on the fact that Dr. Abraham's report included copious amounts of case-specific information and studies purportedly supporting his conclusions.[16]

Because this ruling was made prior to trial, however, the district court did not have the opportunity to examine whether Dr. Abraham's specific-causation trial testimony was *actually* based on that foundation.

SCAPA DRYER FABRICS, INC. V. KNIGHT

The Supreme Court of Georgia in *Knight* faced a challenge similar to those raised in *Krik* and *Anderson*, but on appeal of a trial-court decision admitting Plaintiff's expert Dr. Jerrold Abraham's specific-causation testimony, with Scapa arguing Dr. Abraham's cumulative exposure theory was scientifically unreliable and did not comport with the legal requirements for causation under Georgia law.[17]

The court first recognized that "a trial court must assess three aspects of proposed expert testimony — the qualifications of the expert, the reliability of the testimony, and the relevance of the testimony — to discharge its responsibilities as a gatekeeper under [Georgia's statute governing admissibility of expert testimony]."[18]

The court focused heavily on the relevance — or "fit" — of Dr. Abraham's testimony with respect to Georgia's causation standard, explaining that a plaintiff must prove that an exposure was a contributing factor — *i.e.*, a "meaningful contribution" to the disease — and that a "*de minimis* contribution" is not enough.[19]

The court acknowledged that "Dr. Abraham opined that, if Knight actually was exposed to asbestos while working at [Scapa], that exposure was a cause of his mesothelioma, regardless of the precise extent of the exposure."[20]

The court recognized, however, that Dr. Abraham also testified about Mr. Knight's hypothetical asbestos exposures, as well as studies regarding exposure levels creating an increased risk of disease.[21]

But the court observed Dr. Abraham's testimony "essentially told the jury that it was unnecessary to resolve the extent of exposure at the" Scapa facility because so long as "the jury determined that Knight was exposed at the facility to *any* asbestos beyond background, that exposure contributed to his cumulative exposure, and ... it was, therefore, a contributing cause of the mesothelioma."[22]

Critically, "[b]ecause Dr. Abraham failed to adequately qualify his opinion on causation and condition it upon a reliable estimate of actual exposure, his opinions [were] not saved by his additional testimony about the hypothetical extent to which Knight might have been exposed to asbestos."[23]

Rather, Dr. Abraham's testimony "invited the jury to find causation if there was any exposure by Scapa, even if it were only de minimis" (and therefore insufficient under Georgia law).[24]

The court cited *Anderson II* in explaining that "in one case, a court admitted the causation testimony of Dr. Abraham himself, in large part because Dr. Abraham had based his opinion not only upon a theory of any exposure or cumulative exposure, but also upon a review of the evidence of the extent of exposure, as well as a review of studies showing that such exposures present an increased risk of developing mesothelioma."[25]

In *Knight*, however, the record demonstrated that Dr. Abraham's opinions were actually based on the following rationale:

> When someone is exposed to respirable asbestos in excess of the background, however, his cumulative exposure may build to a point that it exceeds the capacity of the lungs to absorb the exposure, and at that point, the cumulative exposure may lead to mesothelioma.

According to Dr. Abraham, the precise point at which cumulative exposure is sufficient to cause any particular person to develop mesothelioma is not scientifically knowable, and for that reason, when a person actually has mesothelioma, it can only be attributed to his cumulative exposure as a whole.

The Supreme Court of Georgia's analysis demonstrates the importance of the record when addressing challenges to the admissibility of expert causation testimony.

Because each and every exposure to respirable asbestos in excess of the background contributes to the cumulative exposure, Dr. Abraham reasoned, each exposure in excess of the background is a contributing cause of the resulting mesothelioma, regardless of the extent of each exposure.[26]

Accordingly, Dr. Abraham's conclusions were ultimately based on his opinion that every above-background exposure should be treated as contributing factor to an asbestos-related disease — and, much like many other experts, that opinion formed the foundation for his causation opinions, regardless of any additional evidence that he might have considered.

The Supreme Court of Georgia's analysis, along with the differing outcomes in *Anderson II* and *Knight*, demonstrate the importance of the record when addressing challenges to the admissibility of expert causation testimony.

Perhaps more importantly, however, they highlight that the true foundation for an expert's testimony can often be masked with a discussion of other evidence that is ultimately immaterial to the expert's conclusions.

CONCLUSION

As the Supreme Court of Georgia emphasized in *Knight*, an expert's specific-causation conclusions must *fit* the controlling legal standard to be relevant and admissible. Specifically, where a jury is tasked with resolving issues such as whether an exposure to a particular defendant's product contributed (or substantially contributed) in causing an injury, an expert should not be permitted to testify to an ultimate conclusion that such exposures did so unless the expert's opinion is actually based on a consideration of the same factors the jury is to consider in rendering its verdict.

Accordingly, even where an expert testifies that — based on the circumstances of the alleged exposures and related scientific studies — a specific exposure contributed to an injury, defendants should consider challenging that testimony where it can be shown that the expert's conclusions do not actually depend on that specific evidence at all.

In such cases where the evidence upon which an expert relies does not comport with what the jury must consider, the expert's opinions are irrelevant for lacking the necessary "fit" with the controlling legal standard. WJ

NOTES

[1] *Scapa Dryer Fabrics, Inc. v. Knight*, --- S.E.2d ----, 2016 WL 3658923 (Ga. July 5, 2016).

[2] Expert testimony based on this opinion is colloquially referred to as, for example, the "any-exposure theory," the "each-and-every-exposure theory," and the "single-fiber theory." *See, e.g., Krik v. Crane Co.*, 76 F. Supp. 3d 747 (N.D. Ill. 2014).

[3] *See, e.g., Vedros v. Northrop Grumman Shipbuilding, Inc.*, 119 F. Supp. 3d 556 (E.D. La. 2015) ("The judicial reception to [any-exposure] theory has been largely negative."); *Comardelle v. Pa. Gen. Ins. Co.*, 76 F. Supp. 3d 628 (E.D. La. 2015) (excluding testimony, observing opinion was not based on specific facts of case); *Krik v. Crane Co.*, 76 F. Supp. 3d 747 (N.D. Ill. 2014) (excluding testimony based solely on expert's opinion that all exposures must be considered substantial under *Daubert*); *Betz v. Pneumo Abex LLC*, 44 A.3d 27 (Pa. 2012) (excluding testimony under *Frye* where there was no comparative analysis of alleged exposures); *Butler v. Union Carbide Corp.*, 712 S.E.2d 537 (Ga. Ct. App. 2011) (upholding trial court's exclusion of opinion under *Daubert*); *see also* Nicholas P. Vari & Michael J. Ross, State Courts Move to Dismiss "Every Exposure" Liability Theory in Asbestos Lawsuits, Legal Backgrounder vol.29 no.3 (Washington Legal Found., D.C.) (Feb. 28, 2014).

[4] *Krik v. Crane Co.*, 76 F. Supp. 3d 747 (N.D. Ill. 2014). The court also recognized that "[o]ther monikers [for the 'any exposure theory'] include the 'Each and Every Exposure' theory, the 'Single Fiber' theory, and the 'no safe level of exposure' theory." *Id.* at 750 n.3.

[5] *Id.* at 752.

[6] *Id.* at 752–53 (internal citations omitted).

[7] *Id.* at 753.

[8] *Id.*

[9] *See, e.g., Anderson v. Ford Motor Co.*, No. 2:06-cv-741 TS, 2014 WL 806102 (D. Utah Feb. 28, 2014) (*Anderson II*); *Dixon v. Ford Motor Co.*, 70 A.3d 328 (Md. 2013) (finding expert's opinion admissible where, inter alia, expert was posed hypothetical based on evidence involving specific circumstances of alleged exposure).

[10] Plaintiff's specific-causation experts were Dr. Barry Horn and Dr. Steven Dikman; the court considered the substance of Dr. Dikman's report, despite his recent death. *Anderson v. Ford Motor Co.*, 950 F. Supp. 2d 1217, 1219 (D. Utah 2013) (*Anderson I*).

[11] *Id.* at 1222–23.

[12] *Id.* at 1225.

[13] *Anderson II*, 2014 WL 806102, at *1.

[14] *Id.* at *3 (footnote omitted).

[15] *Id.* at *3.

[16] *Id.* at *4.

[17] *Scapa Dryer Fabrics, Inc. v. Knight*, --- S.E.2d ----, 2016 WL 3658923, at **1–2 (Ga. July 5, 2016).

[18] Georgia's standard governing the admissibility of expert testimony was derived from Fed. R. Evid. 702, and Georgia courts look to federal appellate decisions for guidance in evaluating the propriety of expert testimony. *See id.* at *2 n.5; *see also Mason v. Home Depot U.S.A., Inc.*, 658 S.E.2d 603, 610 (Ga. 2008) (observing Georgia's governing statute "was based on Fed. R. Evid. Rule 702, which in its present form is based on the holdings in *Daubert*," and finding proper trial court's application of *Daubert*).

[19] *Knight*, --- S.E.2d ----, 2016 WL 3658923 at 3.

[20] *Id.* at *2.

[21] *Id.* at **4–5.

[22] *Id.* at *3.

[23] *Id.* at *5.

[24] *Id.* at *4.

[25] *Id.*

[26] *Id.* at *2.

Case to watch: California to weigh take-home liability

(Reuters) – California's highest court is set to decide whether companies can be held liable to family members, partners or roommates of employees who carry home asbestos on their clothes and bodies, an issue that has divided the state's courts.

Kesner v. Superior Court of California, No. S219534, oral argument scheduled (Cal. Sept. 7, 2016).

Haver v. BNSF Railway Co., No. S219919, oral argument scheduled (Cal. Sept. 7, 2016).

On Sept. 7, the California Supreme Court will hear arguments in the consolidated appeal of a pair of conflicting decisions over companies' duty in cases of "take-home" exposure to asbestos and other toxic substances.

The first of the two cases before the court is *Kesner v. Superior Court*, brought by a man who said he developed mesothelioma from exposure to asbestos on clothing worn by his uncle, who worked at brake plant owned by defendant Pneumo Abex.

Abex pointed to a then-recent 2012 ruling from California's 2nd Appellate District, *Campbell v. Ford Motor Co*, 206 Cal. App. 4th 15 (Cal. Ct. App., 2d Dist. 2012), which said Ford owed no duty of care to a woman who had never been on its premises but said she got mesothelioma after laundering clothing worn by family members who installed asbestos at one of the company's plants.

The trial court threw out *Kesner*, but the 1st District reversed on appeal, distinguishing its negligence claim from the premise-liability claim in *Campbell*. *Kesner v. Superior Court,* 226 Cal. App. 4th 251 (Cal. Ct. App., 1st Dist. 2014). Moreover, companies like Abex had "substantial reason" to believe there was potential harm from take-home contamination, the ruling held.

Just before *Kesner* was decided, the 2nd District heard oral arguments in another take-home exposure case brought by the children of Lynne Haver. Haver died in 2009 after developing mesothelioma allegedly caused by exposure to asbestos on her husband, who worked at a predecessor to defendant BNSF Railway.

The 2nd District affirmed the trial court's dismissal in a 2-1 ruling, saying *Haver* was more like *Campbell*, with its premise-liability claim, than *Kesner*. *Haver v. BNSF Ry. Co.*, 226 Cal. App. 4th 1104 (Cal. Ct. App., 2d Dist. 2014).

"Just as companies cannot dump poison into a stream or release toxic fumes into the wind, they shouldn't be allowed to coat unwitting workers in toxic dust and send them home," said Ted Pelletier, who represents the *Kesner* plaintiffs.

BNSF's lawyer Theodore Boutrous said the court was being "asked to decide whether to impose a new, logically unbounded duty on companies and property owners that would substantially exacerbate the asbestos litigation crisis."

Courts in six states, including Indiana, Louisiana and New Jersey, have recognized some form of take-home liability, while 16 others have either barred or limited such claims.

> Attorneys on both sides have called the consolidated appeal a critical one for determining how far companies' liability may reach for exposure to toxic substances like asbestos.

Dissenting Judge Michael Mink criticized the distinction by claim, arguing they were all based on the "alleged negligence of the employer."

As the California Supreme Court prepares to take up both cases, attorneys on both sides have called the consolidated appeal a critical one for determining how far companies' liability may reach for exposure to toxic substances like asbestos and similar materials.

James Parker, who represents Abex, said the question was ultimately one of public policy.

"We think it's important that people have bright lines so people know what their duties are, know how to protect people from possible harm, and not drive up the cost of business," he said. WJ

(Reporting by Jessica Dye)

MARITIME

Asbestos defendants lose jurisdiction battle

Two companies defending against asbestos-related personal injury suits brought by merchant seamen waived their right to assert that an Ohio federal court does not have personal jurisdiction over them, the 3rd U.S. Circuit Court of Appeals has ruled.

In re Asbestos Products Liability Litigation, Nos. 15-1387, 15-1388 and 15-1389, 2016 WL 4395353 (3d Cir. Aug. 18, 2016).

By asserting their willingness to litigate the lawsuits in the U.S. District Court for the Northern District of Ohio in Cleveland, the defendants waived their lack-of-personal-jurisdiction defense, a three-judge 3rd Circuit panel said in an Aug. 18 opinion.

Former seamen Lionel Wilson, Joseph Braun and Thomas Guiden sued Matson Navigation Co. and American President Line Ltd. in the District Court about three decades ago, the opinion said. The plaintiffs alleged they were harmed from asbestos exposure. All three have since died.

The cases were consolidated in the District Court's maritime docket before Judge Thomas Lambros, according to the opinion.

Matson moved to dismiss the complaints for lack of personal jurisdiction. The judge ruled that he lacked jurisdiction over Matson but asked the plaintiffs to say which jurisdictions the cases could be transferred to, the opinion said. He also told the defendants they could choose to stay in his court, the opinion added.

Judge Lambros said he would transfer some of the cases to the U.S. District Court for the Eastern District of Michigan.

Attorneys for Matson and American did not agree to trying cases there and said their clients "waived jurisdictional objections to proceed here in Cleveland," according to the opinion.

The judge transferred a cluster of cases, including those filed by Wilson Braun and Guiden, to Michigan over their objections. They asked that their cases be retained for trial in Cleveland, the opinion said.

Following the creation of an asbestos multidistrict litigation proceeding in the U.S. District Court for the Eastern District of Pennsylvania, the cases were transferred there in 1991 for pretrial motions.

The cases lay dormant in the MDL for about 20 years in what has been called the "black hole" of asbestos litigation before they were activated for pretrial rulings.

Plaintiffs in other cases have said there have been interminable delays in the MDL, which can remand suits to their original forums only after all pretrial proceedings have run their course.

Judge Eduardo C. Robreno, presiding over the asbestos MDL, granted the companies' motion to dismiss for lack of personal jurisdiction, finding Matson and American had raised the defense throughout the litigation.

The plaintiffs appealed to the 3rd Circuit.

The panel said it was "stretch" to find that the defendants did not waive their personal jurisdiction defenses in 1991 when they consented to have certain maritime cases tried in Ohio.

The record shows that the defendants, in opposing transfer of the cases to Michigan, requested they be tried in Ohio, according to the opinion.

"The conclusion is clear: Matson and American waived their personal jurisdiction defenses and wished to proceed to trial in the Northern District of Ohio," the panel said. WJ

Related Court Document:
Opinion: 2016 WL 4395353

See Document Section C (P. 26) for the opinion.

Man says cigarette giveaways caused addiction, emphysema

By Rae Theodore

A New Hampshire man says major tobacco companies are liable for his end-stage lung disease because their cigarette giveaways got him hooked when he was 14.

Raleigh v. R.J. Reynolds Tobacco Co. et al., No. 16-2198, complaint filed (Mass. Super. Ct., Suffolk Cty. July 13, 2016).

The cigarettes "were defective and unreasonably dangerous and should not have been marketed, given or sold to Walter Raleigh at any time, but especially not when he was a child," according to the complaint filed in Massachusetts' Suffolk County Superior Court.

Raleigh's complaint names as defendants five cigarette manufacturers, including R.J. Reynolds Tobacco Co., Philip Morris USA Inc. and Lorillard Tobacco Co.

It also names as defendants Demoulas Super Markets Inc. and Shaw's Supermarkets Inc., which owned stores where Raleigh allegedly purchased the cigarettes he smoked, and cigarette distributor Garber Bros. Inc.

Raleigh alleges R.J. Reynolds, Philip Morris and Lorillard provided him with free cigarette samples in 1960 when he was 14 and living in Newburyport, Massachusetts. He says he had not smoked until he was given free cigarette samples by the tobacco companies.

Raleigh says he "quickly became addicted to nicotine" and ended up smoking two packs of cigarettes a day for decades because of the free samples.

He was diagnosed with end-stage emphysema in September 2013, the lawsuit says.

"Defendants employed targeted marketing techniques designed to attract children and teenagers to smoking in order to secure them as long-term customers," the suit says.

The plaintiff says the tobacco companies used marketing techniques including giveaways, promotional items and ads that "assisted in creating a generation of addicted smokers."

Raleigh alleges he has been unable to quit smoking despite his smoking-related health problems. He says his lung capacity is about 30 percent of what it should be, his condition is permanent, and his health will continue to decline until it causes his premature death.

The lawsuit asserts claims for breach of warranty, negligence and conspiracy.

Raleigh says the cigarette companies were experts in tobacco and manipulated their cigarettes to maximize addiction. He says they knew about the dangers associated with the products but failed to warn about them or design the products to be safer.

"Walter Raleigh did not have the same knowledge as defendants," the suit says.

Raleigh seeks damages for pain and suffering, past and future medical expenses, punitive damages, and attorney fees. WJ

Attorneys:
Plaintiff: Walter Kelley and Paula S. Bliss, Kelley Bernheim Dolinsky LLC, Plymouth, MA

Related Court Document:
Complaint: 2016 WL 4142280

Altria removes Tony Gwynn wrongful-death suit to California federal court

By Rae Theodore

Altria Group Inc. says a lawsuit accusing it and a subsidiary of addicting Major League Baseball great Tony Gwynn to smokeless tobacco and causing his death at age 54 belongs in California federal court.

Gwynn et al. v. Altria Group Inc. et al., No. 16-cv-1999, removal notice filed (S.D. Cal. Aug. 9, 2016).

Altria alleges that in-state retailers and distributors of the tobacco products Gwynn used were fraudulently joined to defeat diversity jurisdiction.

Retailers and distributors have immunity under California law from product liability actions, according to the removal notice Altria filed in the U.S. District Court for the Southern District of California.

SUIT OVER GWYNN'S DEATH

Gwynn, nicknamed "Mr. Padre," played for the San Diego Padres from 1982 to 2001 and was inducted into the Baseball Hall of Fame in 2007.

He died in June 2014 after developing salivary gland cancer on the lower right side of his mouth, where he had dipped tobacco for most of his life, according to the lawsuit filed May 23 in the San Diego County Superior Court.

In addition to Altria, the defendants include subsidiary U.S. Smokeless Tobacco Co., which bills itself as the "world's leading producer and marketer of moist smokeless tobacco products," and unidentified "Doe" defendants. USSTC sells smokeless tobacco brands such as Skoal, Copenhagen, Red Seal and Husky.

The suit also names as defendants Young-Westwood Enterprises Inc. and Exoil Corp., the operators of the AM-PM mini-marts where Gwynn allegedly purchased his smokeless tobacco, as well as three individuals who allegedly conducted on-campus marketing at his university that included handing out free samples of the defendants' smokeless tobacco products.

REUTERS/Sam Hodgson

Fans watch highlights at a June 16, 2014, memorial to San Diego Padres outfielder Tony Gwynn, whose family is suing tobacco companies over his death from cancer at 54.

NOTICE OF REMOVAL

In its notice of removal, Altria says those in-state defendants were fraudulently joined and should be dismissed from the lawsuit.

For nearly 30 years, retailers and distributors of tobacco products have been given "explicit statutory immunity" under Cal. Civ. Code § 1714.45 from product liability lawsuits like this one, according to the removal notice.

"Such claims have never succeeded in California against retailers and distributors of tobacco products," the notice says.

Without the California defendants, complete federal diversity of citizenship exists because Altria and USSTC are based in Virginia and the plaintiffs are California residents, Altria says.

The company says the amount in controversy exceeds the jurisdictional minimum of $75,000 for federal action.

DIPPING HABIT

Smokeless tobacco is a shredded moist tobacco that is used by taking a pinch, or a "dip," and placing it between the lip or cheek and the gum.

Gwynn allegedly started dipping tobacco at 17 when he was a freshman playing baseball at San Diego State University and was given "countless" free samples.

After Gwynn became addicted to smokeless tobacco, he used 1.5 to two tins of Skoal per day — the equivalent of smoking four to five packs of cigarettes daily — for 31 years, the suit says.

ALLEGED NEGLIGENCE

The plaintiffs claim the defendants knew smokeless tobacco was addictive and caused oral cancer but lied about the health risks.

The family says the defendants wanted Gwynn to become addicted to tobacco, calling him a "marketing dream come true" because of his baseball talent and likability.

The lawsuit asserts claims for negligence, negligent product liability, design defect, failure to warn, negligent misrepresentation and fraudulent concealment.

The complaint says the defendants increased the dangerousness of the product by adding chemicals and flavorings to make it more addictive and failed to warn of its "dangerous, defective and adulterated condition."

It also accuses them of focusing on black men like Gwynn through a targeted marketing and sales program.

The family seeks damages for wrongful death, loss of companionship and loss of economic support. WJ

Attorneys:
Plaintiffs: David S. Casey Jr. and Frederick Schenk, Casey Gerry Schenk Francavilla Blatt & Penfield, San Diego, CA

Defendant (Altria): Frank P. Kelly and Patrick J. Gregory, Shook Hardy & Bacon, San Francisco, CA

Related Court Document:
Notice of removal: 2016 WL 4218582

See Document Section D (P. 30) for the notice of removal.

TOXIC TORTS

D&O insurer says it got no notice of toxic tort pact, owes no coverage

By Frank Reynolds

A D&O insurer says it has no duty to fund the settlement of an underlying toxic tort suit against Exide Technologies' officers who allegedly ignored the bankrupt battery maker's purported pollution of a California town.

Allied World National Assurance Co. v. Bloch et al., No. 16-cv-710, complaint filed (D. Del. Aug. 12, 2016).

Allied World National Assurance Co.'s declaratory judgment complaint in the U.S. District Court for the District of Delaware claims the company does not need to defend Exide's top officers or fund their pact with a host of residents of the allegedly polluted town of Vernon.

The residents sued Exide's top officers in California state court in December 2014, claiming the company's nearby battery recycling plant exposed them to lead and arsenic for years.

State regulators shut down the plant in April 2013 after finding illegal discharges of lead and arsenic into the air, water and soil around the facility.

The residents' suit, seeking monetary damages, accused Exide President R. Paul Hirt Jr., CEO James R. Bloch, Chief Financial Officer Phillip Damaska, plant manager John Hogarth and environmental manager Ed Mopas of negligence, strict liability for ultrahazardous activity, misrepresentation and fraudulent concealment. *Aguirre et al. v. Exide Techs. et al.*, No. BC567401, *first consolidated complaint filed* (Cal. Super. Ct., L.A. Cty. July 13, 2016).

According to Allied's complaint, Exide entered bankruptcy protection in June 2013 and emerged in March 2015 after a Delaware federal bankruptcy judge approved a reorganization plan that included a tentative settlement of the residents' consolidated toxic tort suit.

California regulators shut down a battery recycling plant in April 2013 after finding illegal discharges of lead and arsenic into the air, water and soil around the facility.

The settlement would release the defendant officers in return for giving the residents' attorneys access to Exide's $10 million excess policy with Allied, according to the insurer's suit.

Allied says it has not given written consent for the settlement, which is required under the terms of Exide's insurance policy.

As a result, the insurer says, it has no duty to fund the settlement or pay the defense costs the officers incurred before the settlement.

Allied further says that as an excess insurer it has no duty to pay anything until it sees proof that Exide's primary insurers have paid out the total of $50 million from their policies for genuine claims. There is no proof of any payments, Allied alleges.

Moreover, the reorganized Exide has agreed to pay out up to $1 million on behalf of "some or all" of the individual defendants and there is no proof that has happened, the suit says. Allied says it is not required to make any payments until that occurs.

The insurer asks the court for a declaratory judgment that it has no obligation to pay any proceeds from its policy until those various conditions are met. WJ

Related Court Document:
Complaint: 2016 WL 4267910

See Document Section E (P. 36) for the complaint.

Insurer moves to dismiss restaurant's mold remediation suit

By Rae Theodore

An insurer says a federal lawsuit filed by a Los Angeles restaurant owner accusing it of breach of contract and bad faith for failing to pay to remediate mold should be dismissed because there is no coverage under the policy.

2 U Turn Restaurant LLC v. Dongbu Insurance Co., No. 16-cv-04934, motion to dismiss filed (C.D. Cal., W. Div. Aug. 9, 2016).

"The loss or damage to property that caused the suspension of 2 U Turn's operations did not result from a covered cause of loss," the motion to dismiss says.

According to the restaurant's complaint filed July 6 in the U.S. District Court for the Central District of California, 2 U Turn Restaurant LLC owns a Parisian-themed restaurant, bakery and bar in Los Angeles called Les Noces du Figaro.

The owner says it discovered mold in the basement and kitchen of the restaurant in summer 2014. An investigation also revealed lead paint and asbestos throughout the basement that would need to be remediated with the mold, the suit says.

According to 2 U Turn, its insurer, Dongbu Insurance Co., based in Korea, denied the claim in December 2014 on the basis the mold was present before 2 U Turn leased the building in 2011.

The owner says Dongbu refused to reverse its claim denial the despite evidence the mold was caused by a rainstorm that leaked water into the basement during the coverage period. The policyholder says it gave Dongbu a structural engineering report that concluded that a crack in the concrete of an alleyway allowed water to leak through the property's basement wall.

The owner says that by November 2014 it had stopped operating Les Noces du Figaro because of the dangers posed to staff and customers from the unremediated hazards.

According to 2 U Turn, Dongbu acted in bad faith by failing to conduct a satisfactory investigation. The policyholder says the insurer failed to interview its landlord and the contractor who prepared a remediation plan for the building. Also, 2 U Turn alleges Dongbu interviewed one of its agents without a French interpreter, which caused it to misconstrue what the agent said.

In its motion to dismiss, Dongbu says the insurance policy only provides coverage for U Turn's business personal property and not for damage to buildings located on the leased property.

Dongbu also argues that the policy excludes coverage for loss or damage caused directly or indirectly by water or "fungi," which includes mold.

"California courts have upheld water exclusions identical to Dongbu's, applying them to bar coverage for loss or damage caused by water," the insurer says.

Dongbu says it is irrelevant whether the cause of its loss was mold in the basement or water that entered through a crack in the alleyway because the policy excludes both from coverage.

The insurer says 2 U Turn is not entitled to business income coverage because the damage that caused it to shut down the restaurant did not result from a covered cause of loss.

The policyholder seeks compensation for the loss of Les Noces du Figaro, loss of use of $1.9 million it spent in 2011 on renovations when it leased the property, loss of use in leased kitchen equipment and attorney fees. WJ

Attorneys:
Plaintiff: Thomas K. Agawa and Ron W. Betty, Agawa Law, Los Angeles, CA

Defendant: Spencer A. Schneider and Karen E. Adelman, Berman Berman Berman Schneider & Lowary, Los Angeles, CA

Related Court Document:
Motion to dismiss: 2016 WL 4445454

Maryland appeals court revives Baltimore man's lead paint case

A Baltimore man has won a second chance to prove that he was left mentally impaired because of lead paint exposure in a home where he lived as a small child, according to a ruling by Maryland's intermediate appellate court.

Christian v. Levitas, No. 2392, Sept. Term 2013, 2016 WL 4076100 (Md. Ct. Spec. App. Aug. 1, 2016).

On remand from the state's highest court, the Maryland Court of Special Appeals on Aug. 1 reversed a trial court's grant of summary judgment to the owner of the house where plaintiff Michael Christian lived for more than six years as a young child and allegedly was exposed to lead. It sent the case back to the Baltimore City Circuit Court for new proceedings.

Christian lived at his grandmother's house on Spaulding Avenue in Baltimore in the 1990s from his birth until he was 2 1/2 and again from about 3 1/2 to 8. In the intervening time, from February to September 1993, the family lived in another Baltimore house, the court said.

Christian was tested twice while he lived at the Spaulding Avenue house, at age 2 and again at 3 1/2, and three times while he lived at the other house, and all the test results showed elevated levels of lead in his blood, according to the Court of Special Appeals panel.

In 2011, as an adult, Christian filed negligence claims against Stewart Levitas, the owner of the Spaulding Avenue house, for causing his alleged lead exposure.

The trial court granted Levitas' motion to preclude Christian's only expert witness, Dr. Howard Klein, from testifying and then granted a defense motion for summary judgment.

APPEAL FILED

In 2013 Christian appealed to the Maryland Court of Special Appeals, which affirmed, finding that the trial court did not abuse its discretion in ruling that Klein was not qualified to express an opinion about medical causation.

The panel also ruled that Klein could not render an opinion about the source of the lead because he had not been furnished with information about the other potential source of lead exposure, the house where Christian lived between his stays at the Spaulding Avenue house.

Christian sought review by the Maryland Court of Appeals, the state's highest court. The high court on Oct. 16, 2015, reversed the Court of Special Appeals ruling in light of its own recent opinion in *Roy v. Dackman*, 445 Md. 23 (2015).

APPELLATE RULING

In its Aug. 1 ruling, the Court of Special Appeals reversed itself and the Baltimore City Circuit Court and sent the case back to the trial court.

The panel noted that in *Roy* the plaintiffs' medical expert was precluded because his opinion that lead-based paint was present at a property was based entirely on circumstantial evidence, such as the age of the home and tests showing the presence of lead paint on the exterior of the property.

In Christian's case, the trial court had more than circumstantial evidence, the court said. It had Christian's blood test results, including one from before he moved to the other house. In addition, it had test results from Arc Environmental Inc., which had performed X-ray fluorescence testing that found 31 interior painted surfaces and five exterior painted surfaces of the Spaulding Avenue house positive for lead-based paint.

The Circuit Court also had property records and testimony by Christian's mother, who told the court that when she moved into the Spaulding property the paint was fresh but that it started to peel about the time Christian was born.

The blood test results showing Christian had been exposed to lead at the only place he had lived up to age 2 1/2, and the Arc report was direct evidence of the likely source of Christian's exposure and a "substantial contributing factor" in causing his injuries, the court said. Christian was not obligated to rule out the other house or any other probable sources of lead exposure, the panel ruled.

The Court of Special Appeals also found that the trial court abused its discretion in precluding Klein's opinion on medical causation. Although he had not met personally with Christian before forming his opinion, Klein had reviewed Christian's medical records, his neuropsychological evaluation, his school records and deposition testimony from his mother and grandmother, the panel said.

Klein's medical opinion that Christian had suffered cognitive impairment as a result of his exposure to lead as a young child was supported by an adequate factual basis and the Circuit Court erred in excluding it, the panel said. WJ

Related Court Document:
Opinion: 2016 WL 4076100

See Document Section F (P. 43) for the opinion.

Baltimore housing authority wins judgment in lead paint suit

A Maryland appeals court has upheld summary judgment for the Housing Authority of Baltimore City in a lead poisoning lawsuit.

Carter v. Housing Authority of Baltimore City, No. 1565, 2016 WL 4076111 (Md. Ct. Spec. App. Aug. 1, 2016).

The Court of Special Appeals found Marie Carter's expert witness failed to establish that her childhood home was the exclusive source of her lead exposure, a necessary element in lead-based-paint cases.

Carter lived at the HABC-owned property at 3223 Cherryland Road from 1987 to 1992, according to the appeals court's opinion. She allegedly tested positive for elevated blood-lead levels in 1989 and 1990.

Carter sued HABC in the Baltimore City Circuit Court for injuries stemming from exposure to lead-based paint. A jury awarded her more than $20 million, but the award later was reduced to $1.1 million under Maryland's statutory cap on noneconomic damages.

HABC appealed the verdict, arguing the testimony of Carter's expert witness, pediatrician Howard Klein, should not have been admitted because he lacked any basis for connecting the Cherryland Road house to Carter's alleged lead levels.

The defendants also said a report from environmental consultant Martel Inc., which found lead paint had only been discovered on the house exterior, should not have been excluded.

The appeals court remanded the case for a new trial on the first point, agreeing that Klein's testimony was inadmissible. While the Circuit Court certified Klein as an expert in pediatrics and childhood lead poisoning, the appeals court found he was not qualified to opine that the Cherryland Road property was the source of Carter's lead exposure.

The appeals court further noted on the second point that no direct evidence supported the existence of lead inside the home.

"Because there was no direct evidence to support the existence of lead inside Ms. Carter's home, Dr. Klein was not qualified to opine to a reasonable degree of medical probability that the home was the source of her exposure to lead," the appeals court said.

Carter had provided a supplemental report from Klein for the new trial, but the Circuit Court found it was still insufficient to establish the Cherryland Road home was the source of lead exposure. It therefore granted summary judgment to HABC.

On the second point, the appeals court rejected Carter's arguments that the Circuit Court hearing the new trial had erred by admitting the Martel report, which showed lead paint on the home's exterior but not the interior.

The appeals court found the Martel report was properly admitted, rejecting Carter's argument that the equipment used to test the paint was not calibrated and that HABC environmental expert Patrick Connor should have been barred from including the report in his expert opinion.

The appeals court noted that Martel included a letter in its report, as per Department of Housing and Community Development guidelines, indicating the equipment was calibrated. The trial court reportedly considered that information in making a credibility call to include the report, and the appeals court saw no abuse of discretion in that decision.

The appeals court also rejected Carter's contention that she made a prima facie case even without Klein's report.

The Court of Special Appeals has held that establishing causation in a lead-based-paint case requires three elements:

- The property was built before 1950.
- The plaintiff tested positive for elevated lead while living at that property.
- The home was the only possible source of the lead exposure.

While Klein was able to demonstrate the first two elements, he could not opine about the third even in his more detailed supplemental report, the opinion said.

"Without all three ingredients, there is no alchemy that a pediatrician can perform to fulfill the plaintiff's burden to make a prima facie case that the defendant's property was the source of plaintiff's lead exposure," the opinion said.

The only evidence of lead at the home comes from the Martel report, which only found lead in the exterior paint, it said.

The appeals court has previously held that the presence of exterior lead-based paint is not enough to infer that the interior paint is also lead-based. Carter could not therefore "rule in" the Cherryland Road home as the exclusive source of her lead poisoning, and the trial court properly granted summary judgment to HABC, the opinion said. WJ

Related Court Document:
Opinion: 2016 WL 4076111

Glass pollution class action can move forward

By Rita Ann Cicero

Kentucky property owners who allege injuries from exposure to hazardous materials from a glass manufacturing plant can continue with their lawsuit, a federal judge in the state has ruled.

Modern Holdings LLC et al. v. Corning Inc. et al., No. 13-cv-405, 2016 WL 4430838 (E.D. Ky. Aug. 17, 2016).

U.S. District Judge Gregory F. Van Tatenhove of the Eastern District of Kentucky rejected the motion to dismiss by defendants Corning Inc. and Phillips North America, who argued that the residents did not satisfy a magistrate judge's "*Lone Pine*" order.

Lone Pine, or case management, orders are used in pre-discovery to ease the complex issues on defendants and the court in mass-tort lawsuits.

The magistrate's order required the plaintiffs to submit certain expert witness findings about their personal injury and property damage claims.

In rejecting dismissal, Judge Tatenhove said, "*Lone Pine* orders should not be used as (or become) the platform for pseudo-summary judgment motions at a time when the case is not at issue and the parties have not engaged in reciprocal discovery," citing *Adinolfe v. United Technologies Corp.*, 768 F.3d 1161 (11th Cir. 2014).

HAZARDOUS CHEMICALS RELEASE

Commercial and residential property owners living near a glass manufacturing plant in Danville, Kentucky, sued Corning and Phillips North America (successive owners of the plant) in federal court.

The plaintiffs allege they have various health problems and property damage because of the facility's negligent release of hazardous chemicals.

They assert nuisance, trespass and negligence claims.

U.S. Magistrate Judge Edward B. Atkins imposed a *Lone Pine* case management order in September 2015.

The order required the plaintiffs to submit affidavits from qualified experts detailing their personal injury and property damage claims.

After the plaintiffs complied with the order, the defendants moved to strike the affidavits and dismiss all claims.

Magistrate Judge Akins denied the defendants' motion and granted the plaintiffs' motion for a case management conference.

When the defendants filed objections to Magistrate Judge Akins' findings, Judge Van Tatenhove agreed to review the recommendations de novo.

In agreeing with the magistrate's findings, Judge Van Tatenhove said that although the affidavits could have been more specific, they were sufficient to survive a motion to strike, and the suit should proceed to discovery.

He emphasized he was not concerned with the overall merits of the case since the matter at hand was strictly procedural. WJ

Related Court Document:
Opinion: 2016 WL 4430838

2nd Circuit denies full court review of Bhopal lawsuit

By Rita Ann Cicero

Indian residents living near a former Union Carbide pesticide plant in Bhopal have lost their bid to have the full 2nd U.S. Circuit Court of Appeals hear their claims that pollution from the factory in the 1970s and 1980s damaged their property and polluted their drinking water.

Sahu et al. v. Union Carbide Corp. et al., No. 14-3087, en banc review denied (2d Cir. Aug. 15, 2016).

The 2nd Circuit denied the petitioners' motion for rehearing en banc or for a rehearing by the three-judge panel that declined to revive the petitioners' class action in May. *Sahu et al. v. Union Carbide et al.*, No. 14-3087, 2016 WL 2990941 (2d Cir. May 24, 2016).

The residents had appealed the judgment of the U.S. District Court for the Southern District of New York that Union Carbide Corp. did not play a direct role in causing the pollution. *Sahu et al. v. Union Carbide Corp. et al.*, No. 07-cv-2156, 2014 WL 3765556 (S.D.N.Y. July 30, 2014).

The question in this case is whether Union Carbide can be held responsible for the contamination from the plant in India that was owned and operated by Union Carbide India Ltd., a subsidiary of U.S.-based Union Carbide.

When Union Carbide India was incorporated under Indian law in 1934, Union Carbide owned a majority of its stock. In 1994, Union Carbide sold all its remaining shares in Union Carbide India, which owned the Bhopal plant.

AMENDED COMPLAINT FILED

The litigation began in 2004 when the plaintiffs sued Union Carbide and former CEO Warren Anderson in federal court, alleging the defendants had contaminated the soil and groundwater with hazardous waste. They sought compensatory damages, an injunction requiring cleanup of the waste and a medical monitoring fund. *Sahu et al. v. Union Carbide Corp. et al.*, No. 04-cv-8825, *complaint filed* (S.D.N.Y. Nov. 8, 2004).

The plaintiffs lost at the District Court and 2nd Circuit.

The contamination is not related to the deadly 1984 toxic-gas explosion at the same plant that killed 3,000 people.

In 2007 plaintiffs filed this present case to toll the limitations period on their property damage claims, according to the 2014 District Court opinion.

The District Court granted their motion to amend their complaint in 2013 to remove Anderson as a defendant and add the state of Madhya Pradesh, which owns the site of the former Bhopal plant, according to the 2014 District Court opinion.

The District Court granted Union Carbide's summary judgment motion and the plaintiffs again appealed to the 2nd Circuit.

The residents argued that declarations from two experts constituted new evidence of Union Carbide's involvement in the plant's waste management system, according to the 2016 2nd Circuit opinion.

In May the 2nd Circuit found that the experts were not presenting new evidence but offering conclusions based on the same evidence that the appeals court previously litigated.

The appeals court concluded that after nine years of contentious litigation and discovery, Union Carbide is not responsible for the plaintiffs' injuries.

In August, the appeals court denied the plaintiffs' motion for a rehearing. WJ

Fruit company

CONTINUED FROM PAGE 1

The plaintiffs submitted their list of five by the Aug. 18 deadline, but United Fruit failed to do so, according the judge's Aug. 24 contempt order.

United Fruit argued in its Aug. 18 motion to amend that the Aug. 12 order "exceeds and eviscerates" the court's mandate to oversee settlement negotiations of the cases.

"The needless setting of 10 overlapping jury trials in one month for failing to settle United Fruit's entire inventory of cases is punitive, inconsistent with the Federal Rules of Civil Procedure and contrary to law," United Fruit said in its Aug. 18 motion.

"There is no legitimate, compelling reason for this unnecessarily compressed pretrial schedule which causes substantial injustice and constitutional harm to United Fruit," the motion said.

The company said it has been requesting information for months about the plaintiffs' claims, including the identity of living witnesses who sailed on United Fruit ships, which the plaintiffs have failed to disclose.

Judge Polster disagreed.

He said in an Aug. 19 order that United Fruit had years to engage in discovery when the cases were in the asbestos multidistrict litigation court.

"When the cases were finally remanded to this court, the MDL judge certified them as trial-ready, meaning that discovery and motion practice was complete," Judge Polster said. "Many, if not most, of the plaintiffs are now deceased."

The judged added that "setting cases for trial is not a punishment, and the court is not punishing United Fruit or plaintiffs. The requirement that a litigant participate at trial comes as an ordinary consequence of being named in a lawsuit."

Attorney Michael Cioffi of Blank Rome LLP, who represents United Fruit, did not respond to a request for a comment. WJ

Related Court Documents:
Aug. 24 order: 2016 WL 4533012
Aug. 19 order: 2016 WL 4485480
United Fruit's Aug. 18 motion: 2016 WL 4470695

See Document Section A (P. 19) for the motion and Document Section B (P. 23) for the Aug. 19 order.

CASE AND DOCUMENT INDEX