The National Forum for
Environmental &Toxic Tort Issues (FETTI)
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In 2001, the Midwestern Environmental Claims Association ("MECA") changed its name to **The National Forum for Environmental & Toxic Tort Issues** ("FETTI") in order to better describe its origins and purpose. FETTI was created by the environmental sector of the insurance industry – specifically for the industry. It is dedicated to the professional development of its members in a cost effective environment. Membership is open to individuals, companies and firms actively engaged in the adjustment, settlement and defense of casualty or property claims arising out of environmental damage or exposure to toxic substances.

Each year our organization convenes in Chicago to host a world-class seminar on a broad range of environmental issues with nationally recognized speakers.

FETTI will convene once again from September 21-23, 2016 in Chicago at the Union League Club.

In an effort to update the FETTI membership, the following summaries consist of recent environmental and toxic tort case law updates.

Trust Transparency Post-*Garlock*: Discovery and Deposition Strategies for Defense Counsel

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In his 2014 *Garlock* opinion, U.S. Bankruptcy Court Judge George Hodges gained nationwide attention by exposing the efforts of several asbestos plaintiffs' law firms to "game" the asbestos recovery system through widespread "suppression of evidence."[1] The court, in what labeled "a startling pattern of misrepresentation," found plaintiffs' attorneys withheld key exposure information in *each and every* case the court reviewed. Thus, *Garlock* revealed a reality that asbestos trust claims abuses are not isolated events, as contended by plaintiff's counsel, but commonplace. As a result of this lack of transparency, the court deemed Garlock's historical settlement values unfairly inflated and therefore unreliable as a basis for estimating Garlock's liability for present and future mesothelioma claims. This revelation confirmed what asbestos defendants had long suspected and has helped undergird a defense-wide demand for

[1] *In re Garlock Sealing Techs., LLC*, 504 B.R. 71 (W.D.N.C. Bankr. 2014).

greater transparency between the asbestos bankruptcy trust and civil tort systems. Defendants now have proof on which to base their assertions that without trust information they are ill-equipped to fully and fairly defend and value cases in the tort system.

Judges around the country are taking notice of the *Garlock* findings and endorsing the value of trust information, mandating changes in their courts and allowing defendants access to trust information. Legislative reforms requiring trust transparency continue to be enacted,[2] and on the federal level, the Furthering Asbestos Claim Transparency (FACT) Act would require asbestos trusts to compile and release quarterly reports on claimants seeking payments for asbestos exposure. In addition to serving as a catalyst for legislative and judicial reforms to improve asbestos bankruptcy trust claim transparency in the tort system,[3] the *Garlock* decision provides defendants with tangible evidence of the difficulties created by the lack of transparency and the means for addressing them.

Defendants must be proactive during discovery to ensure they are seeking all available information about a trust claim, which may include past claims, current claims, deferred claims, and potential future claims.[4] It is important to note that counsel must beware of the legal definitions and pitfalls which may obstruct their trust claims discovery, starting with how a plaintiff is questioned about a "claim." The word "claim" is defined in a myriad of different ways in the bankruptcy trust system. The plaintiffs and their counsel may respond to the general inquiry – *have you ever made a bankruptcy trust claim* – with an unequivocal "no," despite having submitted paperwork to receive compensation in the future. In the tort system, counsel would assume such action constitutes a "claim;" however, in the trust system, it may be called a "filing" or may not even be given a name. Defense counsel should be savvy enough during the discovery period to overcome the potential loss in translation between the trust and tort system.

Thorough discovery and deposition questioning are critical to the analysis of a plaintiff's potential bankruptcy trust claims. To properly identify plaintiff's potential trust claims, defendants must uncover detailed information in discovery and depositions about all of plaintiff's exposures and work history as well as any locations where the plaintiff may have been

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[2] *See, e.g.,* Okla. Stat. tit. 76, §§ 81-89 (2013) (requiring disclosure of "all documents and information relevant or related to a pending or potential claim against a personal injury trust"); Ohio Rev. Code §§ 2307.951 to -.954 (2013) (requiring disclosure of bankruptcy trust claims and allowing stay of actions pending disclosure of trust claims); Wis. Stat. § 802.025 (2014) (requiring disclosure of "all trust documents" and information regarding claims against anticipated trusts; W. Va. Code §§ 55-7F-1 to .011) (2015) ("designed to "[p]rovide transparency for claims made in the asbestos bankruptcy trust claim system and for claims made in civil asbestos litigation" and to "reduce the opportunity for fraud or suppression of evidence in asbestos actions"); Ariz. Rev. Stat. § 12-782 (2015); Tex Civ. Prac. & Rem. Code § 90.051 to -.058 (2015).

[3] *See* Peggy L. Ableman, *The Time has Come for Courts to Respond to the Manipulation of Exposure Evidence in Asbestos Cases: A Call for the Adoption of Uniform Case Management Orders Across the Country*, 30:5 MEALEY'S LITIG. REP.: ASBESTOS 1 (Apr. 8, 2015); Daniel J. Ryan & John J. Hare, *Uncloaking Bankruptcy Trust Filings in Asbestos Litigation: A Survey of Solutions to the Types of Conduct Exposed in Garlock's Bankruptcy*, 15:1 MEALEY'S ASBESTOS BANKR. REP. 1 (Aug. 2015).

[4] For example, the federal asbestos multidistrict litigation court permitted bankruptcy trust claim discovery, including form discovery requests, as well as a standard authorization to obtain trust records and claims information directly from the trusts. (*See* Pretrial Order: Rules and Procedures Relating to the Authorization for Release of Bankruptcy Records Relating to Plaintiffs in the Asbestos Products Liability Litigation, *In re: Asbestos Prods. Liab. Litig. (No. VI)*, No. 2:01-md-00875-ER (E.D. Pa. Dec. 14, 2011)). Similar discovery requests and form authorizations are now being used in asbestos cases around the country.

present. Many of the bankruptcy trusts have published approved site lists, which are publicly available via the trusts' websites. For many of these trusts, the required proof of exposure is as simple as demonstrating the plaintiff's presence at one of thousands of "approved sites."[5] For this reason, at the plaintiff's deposition, it is crucial that testimony be developed as to plaintiff's whereabouts throughout his/her lifetime—where he went to school, where he attended college or vocational training, where he was stationed during any time in the military, every location he has ever worked, regardless of whether or not he is alleging asbestos exposure at that site in his lawsuit and the time period for each of these. Obtaining this information and analyzing it against the trusts' approved worksite lists can reveal thousands upon thousands of dollars available to the plaintiff, which otherwise be lost during the focus of litigation on the alleged exposure site. By way of example, a plaintiff may have served in the United States Navy for a period of time but omit or discount this exposure in his tort system complaint. It is not uncommon for a plaintiff to focus on specific sites of exposure in a case. Instead, the plaintiff may only allege exposure from the 30 years he was employed at an industrial site. The industrial site where he worked may entitle him to bankruptcy trust compensation; however, strict reliance on the single site of the plaintiff's allegations would omit the trust compensation available to the plaintiff for all of the naval stations where he was stationed and the multiple ships he served aboard during his time in the Navy. Such an investigatory failure could skew the value of the case by hundreds of thousands of dollars. Not to mention the fact that failure to identify possible claims may also lead counsel to believe there is no discovery necessary from these trusts. Accordingly, the importance of investigating every place of residence, education, and work, along with other potential exposure locations, of each plaintiff cannot be overstated.

Similarly, it is essential that defense counsel uncover information regarding *all* of plaintiff's exposures. This may sound like common sense, but often times this type of questioning may be skipped when the allegations are focused on a single or sub-set of locations where the plaintiff alleges exposure. Defense counsel seeking a complete exposure picture must not limit themselves to plaintiffs' allegations regarding where, when, and how asbestos exposure occurred. For example, if plaintiff performed automotive work, defense counsel must obtain all of the information about that work possible—what type of work was performed, the locations where the work was performed, the identity of the manufacturer of the products removed and installed, and how often the work was performed, just to begin. This automotive repair work may entitle a plaintiff to payment from certain trusts, regardless of whether this work was performed professionally or only from time to time on his personal automobiles. Therefore, the more details about a plaintiff's possible exposures defense counsel can elicit, the more effectively defendants will be able to determine a plaintiff's available trust claims.

Every trust claim is unique. The trust data and documents may provide information regarding plaintiff's exposures, worksites, years of work, years of exposure, military service, trade, job title, specific product references, smoking history, diagnosis date, diagnosing doctor, screening company connections, previous counsel representing the plaintiff, past addresses, relatives, personal representative, death certificates and numerous other fields of information. Documents, including previously filed complaints, discovery and medicals, are also available from some of the trusts. This information, submitted to the trusts by plaintiffs and/or their counsel and sworn to under penalty of perjury, is relevant in the tort system and should be used to reveal the complete exposure, medical, causation and liability picture of each plaintiff and to challenge the

[5] *See* Lester Brickman, *Fraud and Abuse in Mesothelioma Litigation,* 88 TUL. L. REV. at 1071, 1098 (2014)

plaintiffs' credibility, when possible. Defense counsel must press for disclosure of bankruptcy trust claims prior to any trial setting, mediation, or settlement conference in the litigation.

Plaintiffs' filed trust claims information, product identification, and work history should be utilized *together* to estimate trust payment values. Many bankruptcy trusts have published to their websites trust distribution procedures, which typically include a schedule of trust payment values. This publicly available information allows defendants to estimate the amount of money a plaintiff has received or may be entitled to receive from a trust based on his work history and product exposures. This information continues to be a game-changer in the litigation, providing defendants leverage throughout the litigation to value cases and seek more specific discovery. Plaintiffs' counsel has no valid objection to the trust information which is publicly available from the trusts. Trust value estimations routinely change the values of a case.

Garlock provides defense counsel the opportunity and the impetus to continue thinking innovatively so that their clients in asbestos litigation derive every available benefit from improvements in trust transparency.

Are 6 Angry Men (and Women) Better Than 12? Illinois Litigants Maneuver to Present the Question of the Constitutionality of a Recent Statutory Amendment before the Appellate Courts

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On December 19, 2014, former Illinois Governor Pat Quinn signed into law Public Act 98-1132, amending 735 ILCS 5/2-1105(b) ("the Amendment") to limit Illinois juries to six members for all civil cases filed after June 1, 2015. Prior to the Amendment, the statute provided parties an absolute right to a 12-person jury in civil cases where the alleged damages exceeded $50,000.

Typically, plaintiffs' lawyers support the Amendment. In contrast, the Illinois Association of Defense Trial Counsel opposed the Amendment based upon the premise that a smaller jury is relatively plaintiff-friendly. Additionally, a small jury may present a scenario where a lone juror sways the jury to support his or her conclusion.

In addition to the uncertainty of the effect that this broad change to Illinois civil juries will have, the specific procedural mechanisms for 12-person jury demands is causing confusion. Specifically, some plaintiffs are arguing that a party's failure to pay a jury fee prior to the June 1 deadline forfeits that party's right to a jury of 12. In anticipation of this argument, defendants across the state began filing emergency motions specifically demanding the right to a jury of 12.

In response to the Amendment and the resulting motions, courts are reacting inconsistently. Some Illinois courts, including St. Clair County, recommended that any and all defendants wishing to preserve their right to a jury of 12 pay the additional jury fee immediately. Other

courts, including Madison County and McLean County, instructed their clerks to refuse duplicate payments for jury demands from multiple parties. Defendants were then left to speculate whether payment by one party – the plaintiff or a co-defendant – would be sufficient to preserve the right to a jury of 12 for all defendants, and what effect a withdrawal of such payment would have.

Aside from the procedural difficulties of this Amendment, the constitutionality of the Statute is being called into question and the Appellate Courts may step into the fray. At least one judge in Cook County has ruled that the Amendment creates a facially unconstitutional infringement of the right to trial by jury as provided by the 1970 Illinois Constitution. See *Kakos v. Butler*, Cook County Case No. 15-L-6691. In *Kakos*, the plaintiffs filed their complaint on June 30, 2015, after the effective date of the Amendment. On August 27, 2015, the defendants filed their appearance and a 12-person jury demand, but the Clerk of the Court refused to accept payment for the jury of 12. The defendants then filed a motion for leave to file a twelve-person jury demand and to declare Public Act 98-1132 unconstitutional.

Specifically, these defendants argued that the Amendment's six-person jury rule conflicts with the Bill of Rights to the Illinois Constitution, which provides: "The right of trial by jury as heretofore enjoyed shall remain inviolate." Ill. Const. 1970, art. I, § 13. Judge William Gomolinski's analysis centered on his interpretation of the phrase "heretofore enjoyed" and the historical roots of the right to trial by jury in Illinois. He concluded that the right to a 12-person jury has been a continuous, unbroken right spanning well over a century of Illinois' history and the Amendment reducing a jury from twelve to 6 persons directly conflicted with this constitutionally protected right.

To strengthen the decision, Judge Gomolinski found that the Amendment was unconstitutional under distinct separation of powers grounds pursuant to Ill. Const. 1970, art. II, §1. Through the Amendment, he writes, the legislature exercised power that belongs exclusively to the judiciary and infringed on its ability to regulate conduct at trials. Finally, the decision was based upon a reasoning on public policy, pointing to evidence that decreasing the number of jurors corresponds to a decrease in diversity of the jury, may impede the deliberative process, and decreases the accuracy and predictability of verdicts.

An appeal will likely ensue, the results of which will have far-reaching effects on future cases. A decision finding that this Amendment is unconstitutional would surely prompt a further appeal by the Plaintiffs' Bar, hence the issue will likely remain unsettled until the Illinois Supreme Court issues a ruling.

The Supreme Court of North Dakota Spurns Secondary Exposure

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Recently, the Supreme Court of North Dakota seemingly rejected secondary asbestos exposure liability, otherwise known as "take home" exposure. In Palmer v. 999 Quebec, Inc.,[6] the Court was tasked with deciding the first impression issue of whether a duty of care is owed in a secondary or "take home" asbestos exposure case. In short, whether the Court chose to focus on foreseeability or the existence of a special relationship, it found that plaintiffs could not survive summary judgment. Specifically, the evidence did not show a special relationship between the defendant and decedent, nor did it establish defendant's knowledge of asbestos dangers during the time decedent's father worked for them.

Plaintiffs' decedent, Gary Palmer ("Palmer"), alleged that he had developed mesothelioma through contact with his father's dusty work clothes. Palmer, who died during the pendency of the action, had sued multiple defendants, including A.W. Kuettel & Sons, Inc. ("Kuettel"). Palmer's theory of liability against Kuettel was that his father had worked for them from 1961 through 1965, and then again from 1974 through 1979. Kuettel both supplied and installed asbestos-containing insulation products while performing industrial and commercial insulation work.

Prior to his death, Palmer had given testimony specifying the details of his secondary exposure. For example, Palmer had childhood memories of hugging his father upon his arrival from work, and of playing close to where his mother washed his father's work clothes.

Kuettel eventually moved for summary judgment, in pertinent part, on the basis that it did not owe a duty to Palmer due to the lack of a special relationship between them. The trial court granted the motion. Plaintiff appealed the decision, and argued that the lower court erred in concluding that Kuettel did not owe Palmer a duty. Specifically, it was argued that the lower court erred by not focusing on the foreseeability of the injury when determining the existence of a duty.

The Court began its analysis by acknowledging that other courts had focused on either foreseeability of the injury or the nature of the parties' relationship when deciding whether a duty was owed in a secondary exposure case. With respect to foreseeability of the injury, the Court surmised that foreseeability was contingent upon the employer's knowledge of the risk that employees could take asbestos home and thereby cause injury to others. The Court then noted that the district court, similar to other courts, had focused on the relationship of the parties and thus concluded that Kuettel did not owe Palmer a duty, as no special relationship had existed between them.

Consulting its recent jurisprudence, the Court stated that foreseeability of the injury was typically a jury question, unless "the facts are such that reasonable minds could not differ." Additionally, there was a recent case that defined duty as being a question of whether the relationship between the parties gave rise to a legal obligation. The Court ultimately decided that summary judgment

[6] Palmer v. 999 Quebec, Inc., 2016 N.D. 17 (Jan. 14, 2016).

had been proper, as there was no special relationship between the Kuettel and Palmer and the injury had not been foreseeable. Therefore, whether analyzed based upon foreseeability of the injury or the relationship of the parties, no genuine issue of material fact existed that would have allowed the case to withstand summary judgment.

The Court made a specific point of addressing the fact that Palmer had tried to use a 1973 Minnesota statute prohibiting the use of powdered asbestos to establish Kuettel's knowledge of asbestos dangers. However, Palmer's father had taken a hiatus from his employment with Kuettel in 1965; and, there was no evidence Kuettel was still using asbestos products when his father returned in 1975. This only served to bolster the Court's ultimate conclusion that Palmer had presented no evidence which established a duty under the law.

Maryland High Court Rules Pump Manufacturer Has Duty to Warn for Replacement Parts Made by Others

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In a 5-2 opinion, the Maryland Court of Appeals ruled in mid-December that a pump manufacturer has a duty to warn for asbestos-containing replacement components it did not place into the stream of commerce. The decision ruled that in the limited circumstances under negligence and strict liability, the duty to warn exists when four factors are met: 1) the manufacturer's product contains asbestos components and no safer material is available; 2) asbestos is a critical part of the pump sold by the manufacturer; 3) periodic maintenance involving handling asbestos gaskets and packing is required; and 4) the manufacturer knows or should know of the risks from exposure to asbestos. The majority opinion, written by Judge Adkins, was joined by Chief Judge Barbera, and Judges Greene, McDonald, and Harrell (retired, specially assigned).

After analyzing foreseeability of harm, the Court concluded that factor weighed heavily in favor of imposing a duty under Maryland law. But it also examined other factors it had set forth in *Patton v. U.S. Rugby Football*, 851 A.2d 566 (Md. 2004), which include: (i) the degree of certainty that the plaintiff suffered the injury, (ii) the closeness of the connection between the defendant's conduct and the injury suffered, (iii) the extent of the burden to the defendant and the consequences to the community of imposing a duty to exercise case, (iv) moral blame; (v) the policy of preventing future harm; and (iv) the availability, costs and prevalence of insurance. Four of those factors weighed in favor of imposing a duty, one was neutral (policy of preventing future harm), and one slightly tipped against imposing a duty (moral blame). Thus under the negligence theory, the Court concluded that the factors examined along with "the predominant foreseeability factor, finding a duty becomes a clear choice."

The manufacturer argued that the product was the asbestos gaskets and packing, not the pump, but the Court said: "Common sense tells us that the pumps were what [the manufacturer] sold the Navy, and the gaskets and packing are included within that product." In addressing a prior Maryland decision on the issue, *Ford Motor Co. v. Wood*, 703 A.2d 1315 (Md. App. 1998), and other decisions from other states holding there was no duty to warn for replacement parts from a third party, the Court said those cases failed to recognize the exception to the "bare metal

defense" when the ultimate product sold, the pump, "could not function properly without the expendable and noxious component." The focus should be on the final product, the pump, not the "expendable noxious component" that contains asbestos.

In examining the California Supreme Court decision in *O'Neil v. Crane Co.*, 266 P.3d 987 (Cal. 2012), the Maryland Court focused on language that it found allowed a duty in limited circumstances, citing: "[A] product manufacturer may not be held liable in strict liability or negligence for harm caused by another manufacturer's product **unless** the defendant's own product contributed substantially to the harm, or the defendant participated substantially in creating a harmful combined use of the products." *Id.* at 991 (Emphasis added by Maryland Court).

Further, the Court drew no distinction between strict liability and negligence failure to warn claims, citing a prior decision in which the Court had said the two claims had "morphed together … in failure to warn cases." Therefore, due to the intersections between strict liability and negligence in failure to warn cases, the four factors it set forth applied equally to both theories. The Court concluded that it was striking a balance by preserving the rule that a company is not generally liable for asbestos-containing parts it does not manufacture or place into the stream of commerce, but recognized that narrow circumstances exist under the four factors it set forth where a manufacturer can be liable for products it has not touched. Thus the Court reversed the Court of Special Appeals affirmance of summary judgment for the pump manufacturer.

Judges Battaglia and Watts joined in a lengthy detailed dissent.

A Wakeup Call for Overly Aggressive Environmental Attorneys

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When it comes to environmental law, it's not uncommon for attorneys to make outrageous demands that far exceed the value of the claim. After all, a good negotiator always starts out high with the hope of settling at a figure he or she can live with at the end of the day. However, where contribution for environmental cleanup costs is being sought, plaintiffs who make unreasonably aggressive demands at the pre-litigation stage of the claim may do so at their peril. Defendants who find themselves on the receiving end of those outrageous demands have the ability to turn the tables and use their opponent's greed to their advantage.

That's what happened to R.M. Packer when it asked two potentially responsible parties for too much money during pre-suit negotiations. R.M. Packer Co. v. Marmik, 88 Mass. App. Ct. 654 (2015). Packer was seeking contribution for cleanup costs it incurred after one of its employees negligently overfilled an underground gasoline storage tank, spilling hundreds of gallons of fuel onto several nearby properties. Pursuant to G. L. c. 21E, the Massachusetts Oil and Hazardous Material Release Prevention Act, Packer demanded that each potential tortfeasor pay 80% of the cleanup costs it incurred, which would have resulted in a windfall to Packer. The Massachusetts Appeals Court found Packer's overreaching demands so disturbing that it affirmed the trial

court's award of attorney's fees and costs against Packer on an entirely different legal ground than that reached by the trial court.

a. Background

Packer was in the fuel delivery business and Marmik owned the underground tank that Packer overfilled. Dockside had a long-standing business arrangement with Marmik whereby it pumped fuel from Marmik's tank for sale to its motor boat customers. Dockside purchased its fuel from Packer, who delivered it to Marmik's tank, and Dockside paid Marmik a fee in exchange for the use of its tanks.

After the spill, the Massachusetts Department of Environmental Protection conducted an investigation and determined that both Dockside and Packer were "potentially responsible parties" with liability for "response costs" under the Massachusetts Oil and Hazardous Material Release Prevention Act. Packer spent $300,000 to clean up the spill and then sent demand letters to Dockside and Marmik insisting that they each contribute 80% of the remediation costs. Unable to reach an agreement, Packer brought suit against both parties and, pursuant to the statute, requested attorney's fees and costs. Dockside asserted a counterclaim under the same statute for an award of its attorney's fees and costs.

The trial judge made the following findings: 1) Packer's employee caused the spill; 2) Dockside was wholly blameless for the spill; and 3) Dockside was not an "operator" of the site because it had no duty to maintain the tanks, nor did it have a role in the day-to-day operation of the site. The trial judge ultimately concluded that Packer had "no reasonable basis for asserting that Dockside was liable" and awarded Dockside $68,000 in attorney's fees and costs.

b. Massachusetts Oil and Hazardous Material Release Prevention Act

Chapter 21E is patterned closely after the federal superfund statute, known as the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA). Massachusetts, like many states that have enacted their own superfund statutes, requires parties to try to allocate cleanup costs among themselves before resorting to litigation. The statute expressly contemplates the equitable apportionment of response costs among responsible parties, and further requires that the parties be reasonable during the pre-litigation dispute resolution process. If any party undertakes an unreasonable position concerning the existence or extent of the opposing party's liability, the statute permits the award of attorney's fees and costs.

Many states' superfund statutes have expanded environmental liability beyond traditional fault and causation principles, and Massachusetts is no different. Environmental liability now may be based solely on ownership or control of the property where the spill occurred. For example, Chapter 21E not only imposes liability on those who caused the spill, but also on several classes of "potentially responsible parties," without regard to fault, including:

1) owners and operators of sites where there has been a release of oil or hazardous material;
2) any person who arranged for the transportation, disposal, storage, or treatment of hazardous material

c. Appeals Court Decision

The issue on appeal was whether Packer was properly found liable for attorney's fees and costs under the statute after it unsuccessfully sought contribution from Dockside for costs associated with the cleanup. In its opinion, the Appeals Court briefly explored the issue of whether Packer had a reasonable basis for claiming that Dockside was partially liable for the spill. After all, the DEP had investigated the spill and determined that both Dockside and Packer were "potentially responsible parties" with liability for response costs under the statute. The Court correctly pointed out that if Dockside had met the definition of a "site operator," then it would have been strictly liable and Packer would have had a reasonable basis for asserting Dockside's liability. The Court even conceded that many of the trial court's subsidiary findings, coupled with the DEP's conclusion regarding Dockside's potential liability, supported Packer's claim that Dockside was a "site operator." Things seemed to be turning around for Packer until the Court focused on Packer's efforts to obtain more than its fair share during the pre-suit dispute resolution process mandated by the statute.

The Court reasoned that it did not matter if Packer had a reasonable basis for seeking contribution from Dockside because the award of attorney's fees and costs was independently proper under a different provision of the statute. Instead of deciding the issue of Packer's reasonableness as to Dockside's liability, the Court concluded that Packer's position with respect to the *amount* of Dockside's liability was unreasonable. Packer's insistence that Dockside and Marmik each pay 80% of the cleanup costs was something the Court found "alarming," particularly when Dockside had nothing to do with the spill. In essence, Packer was not only seeking reimbursement for a spill that it caused, but it was pursuing a settlement that significantly exceeded the actual cost of remediation, justifying the award of attorney's fees and costs.

The Packer decision should serve as cautionary tale to both plaintiffs and defendants engaged in the practice of environmental law as both sides need to take their obligation to be reasonable in the pre-litigation process seriously. Defendants, even those partially responsible for spills, now have a sword with which to fight back and plaintiffs would be wise not to overreach during pre-suit negotiations.

Governo Law firm represents clients in toxic tort, asbestos, environmental and other complex regulatory and litigation matters. If you have questions or would like additional information, please contact Brendan Gaughan (bgaughan@governo.com).

Managing Environmental Claims? Learn the Five Keys to Success

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Read the Cover Story of the February issue of *Claims Magazine* to learn about handling environmental claims from classic oil spills to non-traditional "environmental" claims such as asbestos, mold and lead. Authored by Governo Law Firm partners David Governo and Bryna Misiura, the article *Five Keys to Navigating Environmental Claims* describes the factual, legal and logistical challenges that environmental claims present. Most importantly, we also provide five concrete tips that environmental claims professionals can immediately use to bring these complicated claims to a successful resolution more quickly. To read the full article, click here.

Mr. Governo and Ms. Misiura have over 50 years of combined experience in representing and advising clients about environmental, toxic tort and coverage claims. To learn more, please contact dgoverno@governo.com or bmisiura@governo.com.

Illinois Asbestos: Illinois Supreme Court Rules Employees' Exclusive Remedies for Asbestos Claims against Employers are Workers' Compensation/Occupational Disease Acts, Even if Their Claims are Time-Barred under Those Acts

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The Illinois Supreme Court was presented with the question of whether an employee can bring an action against his employer outside of the Workers' Compensation Act (820 ILCS 305/5(a), 11 (West 2010)) and the Workers' Occupational Diseases Act (820 ILCS 310/5(a), 11 (West 2010)) ("the Acts") when the employee's injury or disease first manifests itself *after* the expiration of the time limitations of those Acts. The Court, with four (4) justices in the majority, two (2) dissenting and one (1) taking no part in the decision, held that the exclusivity and repose provisions of those Acts bar Plaintiff's recovery.

In this case the plaintiff's decedent was employed by Ferro Engineering for four (4) years, 1966-1970, and alleged that during this time he was exposed to products containing asbestos. Decedent was not diagnosed with mesothelioma until May, 2011, forty-one (41) years after his employment. Ferro was sued in civil court by both the worker and his wife under several theories, including negligence. Ferro filed a motion to dismiss arguing the plaintiff's claims were barred by the exclusive remedy provisions of the Acts. Plaintiffs replied that the worker's claim fell outside these provisions because the symptoms did not manifest themselves until more than 40 years after his exposure. Accordingly, he maintained that since his the claim was barred before he even became aware of his injury under the 25-year repose provision set forth in section

6(c) of the Occupational Disease Act, his claim was not "compensable" and thus was not time barred.

The trial court granted Ferro's motion finding that the running of the repose period did not render the cause non-compensable. The appellate reversed finding that the employee-worker never had an opportunity to seek compensation under the Compensation Act and thus his claims were "quite literally not compensable" and not barred.

Ruling for the employer, the Supreme Court reviewed the purpose of the workers' compensation acts, and noted that both contain exclusive remedy provisions which balance the sacrifices and gains of both employees and employers. The Court observed that the General Assembly established the Acts were designed to cover the entire universe of an employee's rights against his employers.

There are exceptions to the exclusivity bar: if the employee establishes that the injury (1) was not accidental; (2) did not arise out of his employment; (3) was not received during the course of employment; or (4) was not compensable under the Act. Plaintiff argued his claim was not compensable under the Act because he never had an opportunity to recover any benefits, as the claim was time-barred before the disease manifested itself. The employer argued that whether an injury is compensable is defined by the scope of the Act's coverage, not a specific employee's ability to recover. The court analyzed its prior holdings and found that the compensability of an injury is related to whether the type of injury fits within the purview of the Acts. "Here, there is no question that based on the allegations in the complaint, (plaintiff's) disease is the type of disease intended to fall within the purview of the Act…There is no dispute for purposes of this appeal that (plaintiff's) disease was precipitated by occupational exposure to asbestos." This was so because the Acts specifically addressed disease caused by asbestos, and employees/spouses have recovered for injuries from workplace asbestos exposure under the Acts. Thus, the Court was convinced the legislature intended that occupational diseases arising from workplace exposure be covered within the Act. Further, it viewed prior Illinois decisions as standing for the proposition that the Acts are the employee's exclusive remedies, regardless of limitations addressing time or the amount or type of recovery permitted under the Acts—"[t]hus, since 1956, this court has held that despite limitations on the amount and type of recovery under the [Workers' Compensation] Act, the Act is the employee's exclusive remedy for workplace injuries."

It followed then that based on the 25-year cut-off to file compensation applications under section 6(c) of the Worker's Occupational Disease and Compensation Acts, those provisions acted as a "statute of repose, and creates an absolute bar on the right to bring a claim….[A] statue of repose extinguishes the action after a defined period of time, regardless of when the action accrued….The purpose of a repose period is to terminate the possibility of liability after a defined period of time." The Court was adamant that since its original enactment in 1936, the time limitation provision "has functioned as a temporal limitation on the availability of compensation benefits and not as a basis to remove occupational diseases from the purview of the Act….[T]he litmus test is not whether there is an ability to recover benefits. Nothing in our statute or the history of our jurisprudence suggests that a temporal limitation removes a work-related injury from the purview of the Act."

The court noted the harsh result of its analysis, and stated it was the province of the legislature to draw the appropriate balance for such claims. The court rejected the surviving spouse's constitutional arguments that the exclusive remedy provisions violated Illinois constitutional provisions regarding equal protection, the prohibition against special legislation, and the right to a certain remedy. At the same time, the Court noted that "[t]he acts do not prevent an employee from seeking a remedy against other third parties for an injury or disease [as in this case where Plaintiffs sued14 defendant manufacturers of asbestos-related products]. Rather, in this case, the acts restrict the class of potential defendants from whom [Plaintiffs] could seek a remedy, limiting [Plaintiffs'] recourse for wrongful death claims to third parties other than the employer."

The pro-plaintiff dissent argued two (2) main points: under the canons of construction, the outcome should be the opposite, and leaving an employee with zero remedy is non-sensical. For their statutory construction argument, the dissenters noted that when construing the provisions of the Workers Compensation Act, "the court may consider the reason for the law, the problems sought to be remedied, the purposes to be achieved, and the consequences of construing the statue one way or another." Since the purpose of the Act was to provide employees and their families prompt and sure compensation for injuries and death suffered in the course of employment, barring the employee and his spouse from any recovery ran directly counter to the Act's fundamental purposes. Relying on a recognized secondary source and a Pennsylvania case finding for the employee, the dissenters ridiculed the majority for their "twisted logic" of barring a compensation claims as well as a civil action.

Practice Pointers: Plaintiffs' counsel often file assault, battery, nuisance, ultra-hazardous strict liability and spoliation claims against their client's employers in an effort to pile-on and end-run the exclusivity of the Illinois Workers' Compensation and Occupational Disease Acts. The *Folta v. Ferro* case give defense counsel and insurers ammunition to thwart such claims. Both complaints and extortionist settlement demands, in appropriate cases, should be countered with the invocation of this decision. The exclusivity bars should be raised in initial motions and argued to preserve the record. Denial of such a motion should be met with a Motion for a Supervisory Order directly to the Illinois Supreme Court, bypassing the appellate court and presenting the debarment argument directly to the Court that authored the *Folta* decision. At least with respect to an employee's claims against an employer defendant, the defense bar now may be in a position to curtail the plaintiff bar's asbestos juggernaut.

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2015 Changes in Joint and Several Liability Standard and Comparative Fault, Contribution and Empty Chair Defense in West Virginia

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A) Joint and Several Liability

In 2015, West Virginia adopted comparative fault and abolished joint and several liability. West Virginia Governor Earl Ray Tomblin (D) signed HB 2002 into law, thus changing the state to one utilizing the modified comparative fault standard and no longer the joint and several liability standard for computation of allocation of fault. Sections 55-7-13 and 55-7-24 of the old West Virginia Code were repealed, and four new sections added 55-7-13a-d. The law is effective from May 25, 2015.

The Key Provisions in the Law

The new code sections 55-7-13(a)-(d) provide:

- The allocation of damages applicable to each entity is to be in direct proportion to that entity's percentage of fault (55-7-13a(b));
- The total of the percentages of fault allocated by the trier of fact with respect to a particular incident or injury must equal either zero percent or one hundred percent (55-7-13a(c));
- Liability for all compensatory damages shall be only several, and not joint (55-7-13c(a));
- Joint liability is applicable where conscious conspiracy exists between two or more defendants, and parties held jointly liable have the right of contribution from defendants that acted in concert (55-7-13c(a));
- Method of computation of damages is set forth in 55-7-13c ("multiply the total amount of compensatory damages recoverable by plaintiff by the percentage of each defendant's fault and, subject to subsection (d) of this section, that amount shall be the maximum recoverable from that defendant." (55-7-13c(b));
- Notwithstanding 55-7-13c(b), "if a plaintiff through good faith efforts is unable to collect from a liable defendant, the plaintiff may, not later than one year after judgment becomes final through lapse of time for appeal or through exhaustion of appeal, whichever occurs later, move for reallocation of any uncollectible amount among the other" liable parties (55-7-3c(d));
- "Upon filing of the motion, the court shall determine whether all or part of a defendant's proportionate share of the verdict is uncollectible from that defendant and shall reallocate the uncollectible amount among the other parties found to be liable, including a plaintiff at fault, according to percentages of fault" (55-7-13c(d)(1));

- "[T]he unit may not allocate to any defendant an uncollectible amount greater than that defendant's percentage of fault multiplied by the uncollectible amount." (55-7-13c(d)(1));
- There will be no re-allocation against a defendant whose percentage of fault is equal to or less than the plaintiff's percentage of fault (55-7-13c(d)(1));
- Joint and several liability also applies to a defendant whose acts and omissions are: 1) alcohol or drug influenced driving, 2) criminal conduct and 3) alleged disposal of hazardous waste (55-7-13c(h)(i)-(3));
- Nonparties are to be included in the consideration of allocation of fault for the harm (55-7-13d(a)(1) ("In assessing percentages of fault, the trier of fact shall consider the fault of all persons who contributed to the alleged damages regardless of whether the person was or could have been named as a party to the suit.");
- Fault of a nonparty is considered if i)"plaintiff entered into a settlement agreement with the nonparty" or ii)"if a defending party gives notice no later than 108 days after service of process that a nonparty was wholly or partially at fault. Notice shall be filed with the court and served upon all parties to the action designating the nonparty and setting forth the nonparty's name and last-known address or the bet identification of the nonparty which is possible under the circumstances, together with a brief statement of the basis for believing such nonparty to be at fault." 55-7-13d(a)(2));
- "In all instances where a nonparty is assessed a percentage of fault, any recovery by a plaintiff shall be reduced in proportion to the percentage of fault chargeable to such nonparty. Where a plaintiff has settled with a party or nonparty before verdict, that plaintiff's recovery will be reduced in proportion to the percentage of fault assigned to the settling party or nonparty." 55-7-13d(a)(3)); and
- Burden of proof for establishing comparative fault is on the party seeking to do so (55-7-13d(d));
- Applicable to all actions arising or accruing on or after effective date (May 25, 2015).

B) Extinguishment of Contribution Claim

In the decision of Modular Bldg. Consultants of W. Va. Inc. v. Poerio, Inc., 774 S.E.2d 555 (W. Va. 2015), the Court held that where a tortfeasor settled with the injured plaintiff and obtains a release for a joint tortfeasor, the release preserves the settling tortfeasor's right of contribution against the released joint tortfeasor, noting that "[n]o right of contribution exists against any defendant who entered into a good faith settlement with the plaintiff prior to the jury's report of its findings to the court or the court's findings as to the total dollar amount awarded as to damages."

- In *Modular*, the injured plaintiff had not sued the non-settling defendant directly and the statute of limitations had run as against the non-settling defendant. The *Modular* court noted that such a scenario "has been found by an 'overwhelming majority' of other courts to be of no moment to this analysis. The rationale is typically that the contribution plaintiff should not be hamstrung by the underlying plaintiff's lack of diligence: Plaintiff's claim should not be compromised merely because the underlying claimant failed to comply with a statute of limitations as to the contribution defendant."
- Thus, *Modular* held "that where a tortfeasor settles with an injured plaintiff and obtains a release for a joint tortfeasor, such release preserves the settling tortfeasor's right of contribution against the released joint tortfeasor."

C) Empty Chair Issues

- The *Modular* court clarified that "there is no *per se* ban on 'empty chair' arguments in West Virginia, and also pointed out that in *Doe v Wal-Mart Stores, Inc.*, 210 W. Va. 664, 558 S.E.2d 663 (2001), the Court held that '[i]t is improper for counsel to make arguments to the jury regarding party's omission from a lawsuit or suggesting that the absent party is solely responsible for the plaintiff's injury *where the evidence establishing the absent party's liability has not been fully developed.*' (emphasis added). There has been little discussion of what level of evidentiary development is necessary to invoke this exception."