Legal Backgrounder

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State Courts Move To Dismiss "Every Exposure" Liability Theory In Asbestos Lawsuits

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In the recent past, the "every exposure" or "single fiber" theory was a common means of imposing unwarranted liability upon *de minimis* exposure defendants in asbestos lawsuits. At its core, the "every exposure" theory enabled asbestos plaintiffs to impose liability on any defendant whose alleged contribution to a plaintiff's lifetime asbestos exposure was literally only a "single fiber," based on the supposed premise that the plaintiff's lifetime exposure is indivisible,[1] and therefore, every fiber to which the plaintiff was exposed could conceivably have contributed to his injury. As a practical matter, the "every exposure" theory obviated the causation element of an asbestos plaintiff's claim, ignoring the well-established scientific link between dose and disease. In other words, this theory permitted jurors to impose liability on defendants whose product exposures were, themselves, insufficient to have caused a plaintiff's injury, thereby making *each* defendant potentially liable for *every* exposure that a plaintiff encountered during his lifetime, regardless of how *de minimis* a particular defendant's product was in relation to the lifetime of exposure.

In *Betz v. Pneumo-Abex, LLC*, 44 A.3d 27 (Pa. 2102), the Pennsylvania Supreme Court rejected the "every exposure" theory as a means of establishing causation in asbestos litigation. In four opinions issued since late July 2013, appellate courts in both Pennsylvania and Maryland have endeavored to define the contours of the *Betz* decision.[2] Although these decisions appear to have reached differing outcomes, the courts uniformly accepted *Betz's* holding that the "every exposure" theory has no place in modern toxic tort litigation. Indeed, even the courts that held in favor of the proponents of the "every exposure" theory held that the theory cannot sustain a liability finding, and that instead, courts must assess individually the exposures alleged against each defendant. Accordingly, these courts have ruled that the alleged exposures attributed to each defendant must stand on their own

The recent decisions interpreting *Betz* confirm what a growing number of courts nationwide have held: that the "every exposure" theory is generally inadmissible and insufficient to establish causation in

[1] Courts across the country require juries to allocate causation, by percentage, among the defendants held liable in any asbestos personal injury lawsuit. *See, e.g., In the Matter of New York City Asbestos Litig. (Brooklyn Naval Shipyard Cases)*, 624 N.E.2d 979 (N.Y. 1993); *W.R. Grace & Co.-Conn. v. Dougherty*, 636 So.2d 746 (Fla. Dist. Ct. App. 1994); *Evans v. CertainTeed Corp.*, No. B227075, 2012 WL 4338617 (Cal. Ct. App. Sep. 24, 2012). Indeed, asbestos plaintiffs often ask the juries to impose disproportionate shares upon the defendants who are present at trial. *See, e.g., Evans*, *supra*, 2012 WL 4338617, at **3-5 (upholding grant of new trial based on the jury's decision to allocate no fault to a clearly responsible third party not present at trial, but 70% to the trial defendant). Accordingly, against this backdrop, it is folly to suggest that juries cannot make individual causation findings against each defendant.

[2] *See Howard v. A.W. Chesterton Co.*, 78 A.3d 605 (Pa. 2013); *Dixon v. Ford Motor Co.*, 70 A.3d 328 (Md. 2013); *Nelson v. Airco Welders Supply*, No. 865 EDA 2011 (Pa. Super. Sept. 5, 2013) (non-precedential decision); *Campbell v. A.W. Chesterton, Inc.*, No. 2005 EDA 2012 (Pa. Super. Sept. 5, 2013) (non-precedential decision).

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a toxic tort action.[3] The recent decisions indicate further that, in cases under appellate review in which plaintiffs had presented the since-discredited theory at trial, a court will assess a jury's causation finding by considering only the specific causation evidence that plaintiffs introduced with respect to each particular defendant. At present, the "every exposure" theory is the subject of an appeal pending before the Superior Court of Pennsylvania *en banc* which is expected to be one of the more significant Pennsylvania appellate cases of 2014. *See* "*Pennsylvania Cases to Watch in 2014,*" Law360.com (Jan. 1, 2014).

The* Betz *Decision. To date, the leading decision on the "every exposure" theory is the Supreme Court of Pennsylvania's 2012 decision in *Betz v. Preumo Abex, LLC*, 44 A.3d 27 (Pa. 2012), in which the court rejected what it referred to as the "every breath" theory of asbestos exposure. The opinions on this issue after *Betz* thus far suggest that, to impose liability on a particular defendant, an asbestos plaintiff must prove that exposure to that defendant's product was a cause-in-fact of the plaintiff's disease.[4] While such a standard appears intuitive, it is a marked departure from earlier rulings upholding the "every exposure" theory in past asbestos cases. Those rulings had the effect of rendering each defendant liable for all of the asbestos-containing materials to which a plaintiff might have been exposed over the course of his lifetime, without regard to whether the particular defendant's product actually harmed the injured plaintiff.[5]

The* Dixon *Decision. In *Dixon v. Ford Motor Co.*, 70 A.3d 328 (Md. 2013), Maryland's highest court reversed a decision of the Maryland Court of Special Appeals and reinstated a verdict in favor of a plaintiff. Although it reversed the lower court's decision, the *Dixon* Court did not find that the "every exposure" theory was in any way valid. Rather, it held that because plaintiff's causation evidence offered against the specific defendant at issue was sufficient to sustain the jury's causation finding, it was not reversible error to have permitted the plaintiff's expert to have testified to the "every exposure" theory.

The *Dixon* Court observed that its holding did not imply that the "every exposure" theory is a valid scientific theory under Maryland law. *Id*. at 337. At the same time, the Court concluded that the question of the validity of the "every exposure" theory was not before it, since, under the facts presented, there was sufficient evidence to support the jury's finding of causation without need for the "every exposure" testimony. Nonetheless, the Court cited extensively to *Betz*, and voiced its agreement with the conclusion of the Pennsylvania Supreme Court that a "broad-scale opinion on causation applicable to anyone inhaling a single asbestos fiber above background exposure levels" may indeed be the type of expert opinion that would require careful review under the standards governing the admissibility of scientific opinion testimony.[6]

The* Campbell *Decision. In *Campbell v. A.W. Chesterton, Inc.*, No. 2005 EDA 2012 (Pa. Super. Sept. 5, 2013) (non-precedential decision), an asbestos defendant held liable at trial challenged both the admissibility

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[3] *See, e.g.*, *Betz*, *supra*; *Gregg v. V-J Auto Parts, Co.*, 943 A.2d 216, 226-27 (Pa. 2007); *Borg-Warner Corp. v. Flores*, 232 S.W.3d 765, 773 (Tex. 2007); *Moeller v. Garlock Sealing Techs., LLC*, 660 F.3d 950 (6th Cir. 2011); *Lindstrom v. A-C Prod. Liab. Trust*, 424 F.3d 488 (6th Cir. 2005); *Smith v. Kelly-Moore Paint Co., Inc.*, 307 S.W.3d 829 (Tex. Ct. App. 2010); *McClain v. Metabolife International, Inc.*, 401 F.3d 1233, 1241-43 (11th Cir. 2005); *Anderson v. Ford Motor Co.*, No. 2:06-cv-741, 2013 WL 3179497 (D. Utah June 24, 2013); *Smith v. Ford Motor Co.*, No. 2:08-cv-630, 2013 WL 214378 (D. Utah Jan. 18, 2013); *In re W.R. Grace & Co.*, 355 B.R. 462, 476 (Bankr. D. Del. 2006).

[4] *See, e.g., Ford Motor Company v. Boomer*, 736 S.E.2d 724 (Va. 2013) (adopting a "sufficient-to-have-caused" test for proof of cause-in-fact with respect to each defendant's product alleged to have contributed to an asbestos-related disease).

[5] *See e.g., Jones v. John Crane, Inc.*, 35 Cal.Rptr.3d 144 (Cal. Ct. App. 2005); *Mavroudis v. Pittsburgh-Corning Corp.*, 935 P.2d 684 (Wash. Ct. App. 1997); *Andalaro v. Armstrong World Indus., Inc.*, 799 A.2d 71 (Pa. Super. 2002).

[6] *Id*. Notably, the United States Court of Appeals for the Ninth Circuit recently agreed with this conclusion. In *Barabin v. AstenJohnson, Inc.*, __ F.3d __, Nos. 10-36142, 11-35020, 2014 WL 129884 (9th Cir. Jan. 15, 2014), the court held that a district court erred in admitting "every exposure" testimony from a plaintiff's expert witness without first examining the scientific underpinnings of that testimony in the district court's role as "gatekeeper" under *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). In light of *Barabin*, it appears that all federal district courts must now conduct a thorough review of the admissibility of "every exposure" testimony under *Daubert* prior to permitting its introduction in evidence.

and legal sufficiency of "every exposure" testimony offered through the plaintiff's expert medical witness. The trial evidence in *Campbell* was that Mr. Campbell worked as a welder at the Budd Company in Philadelphia for 20 years, and then as a custodian at the same facility for another 10 years. *Campbell*, *supra*, slip op. at 1. Plaintiff presented evidence that the defendant manufactured a product that contained asbestos, which plaintiff used on a regular basis at the Budd Company facility. *Id*. at 3.

Although plaintiff's expert testified that any asbestos fibers that Mr. Campbell inhaled would have had a role in causing his lung cancer, the court found that the expert's causation analysis regarding the specific defendant at issue was not predicated upon that theory. Rather, it found that plaintiff's expert also based his testimony on "the particular facts of Decedent's background," including his long-term work with and around the trial defendant's product. *Id*. at p. 6. The court likewise noted that the expert "considered other potential causes of Decedent's lung cancer, including his heavy tobacco use, limited exposure to metal fumes in making jewelry as a hobby, and exposure to other asbestos-containing products in the workplace." *Id*. In light of these factors, the *Campbell* court concluded that the expert's causation testimony was not "grounded on a broad 'any exposure' theory of causation." Rather, the *Campbell* court determined that plaintiff's expert causation testimony encompassed a number of defendant-specific factors,[7] and that the trial court did not err in refusing to grant a new trial or judgment notwithstanding the verdict based on the expert's "every exposure" testimony.

The* Nelson *Decision. In *Nelson v. Airco Welders Supply*, No. 865 EDA 2011 (Pa. Super. Sept. 5, 2013) (non-precedential decision), plaintiff's decedent, James Nelson, contracted mesothelioma, which plaintiff attributed to exposures to various asbestos-containing materials, including materials allegedly supplied by the three trial defendants. Like *Dixon* and *Campbell*, the *Nelson* case featured expert medical testimony from plaintiff that "every exposure" Mr. Nelson sustained was a substantial factor in causing his disease. Unlike in the *Dixon* and *Campbell* cases, however, plaintiff's expert medical witness testified to virtually no specific information about the trial defendants' specific asbestos-containing materials. *Nelson*, *supra*, slip op. at 17-18. Accordingly, the plaintiff failed to make a specific causation case against any of the three trial defendants.

Rather than relying on defendant-specific information to form his causation opinions, plaintiff's expert testified that there "are no innocent exposures," and that all of Mr. Nelson's asbestos exposures caused his disease, regardless of the details of the exposure. *Id*., slip op. at 21-23. The panel thus held that the expert's opinions could not be distinguished from the legally and scientifically invalid "every exposure" theory offered by the expert medical witness in *Betz*. *Id*., slip op. at 23. The panel held further that the introduction of this evidence was unduly prejudicial and constituted reversible error. *Id*.

The* Howard *Decision. Within weeks of the release of the Superior Court's decisions in *Nelson* and *Campbell*, the Pennsylvania Supreme Court reaffirmed its *Betz* holding in *Howard*, *supra*. *Howard* was unique procedurally, in that the plaintiff-appellees, who had prevailed before the Superior Court, agreed with the defendant-appellants that Superior Court's ruling in plaintiffs' favor should be reversed under *Betz*. Thus, plaintiffs-appellees consented to a reversal before the Supreme Court. Nevertheless, in lieu of a brief statement regarding a stipulated reversal, the Supreme Court chose to issue an opinion—at defendant-appellant's request—to "reaffirm several governing principles" in the area of causation in toxic tort matters. *See Howard, supra,* 78 A.3d at 608.

[7] *Id*. at 7. For these reasons, the *Campbell* court distinguished the case before it from *Betz*, *supra*, in which the court held inadmissible the "every exposure" testimony of plaintiffs' expert medical witness, Dr. John Maddox, for purposes of proving causation in an asbestos-related tort action. The *Dixon* Court distinguished *Betz* on similar grounds, noting that *Betz* was a "test case" taken to examine the "every exposure" theory in "a global context, without regard, it seems, to any particular facts." *Dixon*, *supra*, 70 A.3d at 336. Accordingly, far from rejecting the *Betz* analysis, each of the opinions examined here embraced the central conclusion of Betz—that "every exposure" testimony is inadmissible and insufficient, in itself, to establish substantial factor causation in a toxic tort action.

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The *Howard* Court confirmed that "the theory that each and every exposure, no matter how small, is substantially causative of disease may not be relied upon as a basis to establish substantial-factor causation for diseases that are dose-responsive." *Id.*, 78 A.3d at 608. The Court further held that in cases involving dose-responsive diseases, (1) "expert witnesses may not ignore or refuse to consider dose as a factor in their opinions," (2) "some reasoned, individualized assessment of a plaintiff's or decedent's exposure history is necessary" before an expert witness can offer substantial-factor causation testimony, (3) bare proof of some *de minimis* exposure to a defendant's product is insufficient to establish substantial-factor causation, and (4) summary judgment is available to address cases involving *de minimis* exposures and causation opinions based on the "any-exposure" theory. *Id*. At least one court observer has characterized this opinion as an expression of the Supreme Court's dissatisfaction with the Superior Court's treatment of *Betz*.

Examining the Four Post*-Betz *Decisions. At first glance, *Dixon* and *Campbell* may appear to be irreconcilable with *Howard* and the panel opinion in *Nelson*, but they are not. In each case, the court began its analysis with the same basic principle: as a matter of law, without more, testimony that "every exposure" to asbestos caused a plaintiff's disease is insufficient to prove causation. Each court recognized from the outset *Betz's* proscription of the "every exposure" theory, and, therefore, the opinions do not suggest that the "every exposure" theory has any basis in Maryland or Pennsylvania law. The noted courts *then* went on to consider whether the expert opinions relating to the causal impact attributed to the specific defendant at issue in those cases were sufficient to support the jury's finding of causation against that specific defendant. The result in each case, therefore, was dependent upon the specific evidence offered against the specific defendant in the specific trial at issue.

The different factual contexts in which these cases arose account for the facially dissimilar outcomes. Thus, in *Dixon* and *Campbell*, the courts upheld jury verdicts upon finding that the plaintiffs had presented evidence of sustained exposures to the specific trial defendants' products. In *Nelson*, however, the expert witness failed to offer such an analysis, and instead simply testified that each of Mr. Nelson's asbestos exposures, regardless of its nature, was causative. As noted above, in *Howard*, the Pennsylvania Supreme Court confirmed that "some reasoned, individualized assessment of a plaintiff's or decedent's exposure history," is a necessary element of an asbestos plaintiffs' burden of proof. While such a standard may ultimately require a quantum of proof that extends well beyond the facts that were held to be sufficient to support liability in *Dixon* and *Campbell*, any standard that is true to *Betz* and *Howard* cannot require anything less than a defendant-specific causation finding with respect to each defendant.

None of the recent decisions interpreting *Betz* even suggests that the "every exposure" theory is either admissible or legally sufficient proof of causation. Accordingly, even those decisions like *Dixon* and *Campbell*—which suggest that the admission of the invalid "every exposure" theory can be harmless error if the expert medical witness offering it also provides legally admissible testimony linking a specific defendant's products with a specific plaintiff's disease—stand for the proposition that an "every exposure" opinion is inadmissible in an asbestos personal injury lawsuit.

Conclusion. There should be no further debate that the "every exposure" theory is legally invalid, and has no place in an asbestos personal injury lawsuit. And, while *Howard* suggests strongly that Superior Court of Pennsylvania precedents may remain at odds with the Supreme Court's landmark *Betz* holding, the evolving standard appears, at a minimum, to require plausible, defendant-specific causation evidence in asbestos lawsuits. While this may be perceived by some to be a departure from existing "asbestos law," it is an intuitive rule, grounded in fundamental concepts of product liability.

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