



## PENNSYLVANIA SPLITS WITH MAJORITY IN ALLOWING “CUMULATIVE EXPOSURES” ASBESTOS-LIABILITY THEORY

by William L. Anderson

Two recent asbestos litigation opinions—one from the Pennsylvania Supreme Court last November and one from a New York appellate court in late February—illustrate the divergent paths today’s asbestos litigation can take. The opinions involve the plaintiffs’ experts’ *any exposure* theory, which posits that every workplace or hobby exposure to asbestos, no matter how small, is part of the cumulative dose and therefore a legal cause of the disease. These experts disdain any need for an assessment of the dose the plaintiff actually received from any single exposure. Instead, plaintiffs’ proximity to asbestos or merely breathing “dust” often gets the case to the jury. The theory is used to pull thousands of defendants into asbestos litigation over minor exposures not proven to be a cause of disease.

Starting in 2005, more than 30 courts have rejected *any exposure* testimony under its several names (*e.g.*, *single fiber*, *each and every exposure*, *cumulative exposure*, “*special*” *exposure*).<sup>1</sup> Those courts include the state supreme courts of Texas, Georgia, Pennsylvania (until November, see below), and Virginia; the US Courts of Appeals for the Sixth and Ninth Circuits; and many lower state and federal courts. The New York Court of Appeals also rejected similar testimony in a benzene/gasoline exposure case in *Parker v. Mobil Oil*.<sup>2</sup> The *any exposure* theory is illogical and unscientific and is not found anywhere in peer-reviewed scientific literature. Instead, as several courts have held, it is a litigation construct put forth by a cadre of testifying experts to support low-dose asbestos and tort litigation.

Despite its flaws, plaintiffs’ attorneys have long used the *any exposure* theory to justify litigation involving minor and inconsequential exposures that no epidemiology study has ever documented as a source of disease. For the past 10 years, defendants have been waging a major battle in asbestos litigation to stop the spread of this testimony and to return asbestos litigation to the rule used in other toxic torts cases—the experts must prove that the plaintiff received a sufficient dose of the substance at issue to cause the plaintiff’s disease.

Litigation in Pennsylvania illustrates how this battle is developing. In 2005, Judge Colville issued one of the most effective eviscerations of the *any exposure* theory in a trial opinion. The Pennsylvania intermediate court, perhaps recognizing the change in asbestos litigation this ruling would produce, reversed. But the Pennsylvania Supreme Court in 2012 agreed with Judge Colville and reinstated the trial court’s decision in *Betz v. Pneumo-*

---

<sup>1</sup> See Mark Behrens & William Anderson, *The ‘Any Exposure’ Theory: An Unsound Basis for Asbestos Causation and Expert Testimony*, 37 Sw. U. L. REV. 479 (2008); William Anderson, Lynn Levitan & Kieran Tuckley, *The “Any Exposure” Theory Round II—Court Review of Minimal Exposure Expert Testimony in Asbestos and Toxic Tort Litigation Since 2008*, 22 KAN. J. L. & PUB. POLICY 1 (2012); William L. Anderson and Kieran Tuckley, *The Any Exposure Theory Round III: An Update on the State of the Case Law 2012-2016*, DEFENSE COUNSEL J. 264 (July 2016).

<sup>2</sup> 7 N.Y.3d 434 (N.Y. 2006).

---

**William L. Anderson** is a Partner at Crowell & Moring LLP in Washington, DC, where he represents defendants in asbestos litigation and writes frequently on the intersection of science and law. Crowell & Moring submitted *amicus* briefs in the *Parker*, *Betz*, *Rost*, and *Juni* appeals referenced herein on behalf of the Coalition for Litigation Justice.

*Abex*.<sup>3</sup> The *Betz* opinion held that the expert's *cumulative* or *every exposure* theory "contained large analytical gaps; was in conflict with the dose-response relationship; and was internally inconsistent." Thus, following *Betz*, Pennsylvania courts should no longer have permitted any form of *any exposure* testimony to support a trial verdict.

Unfortunately, a 2015 judicial election brought in three new justices who supplanted three *Betz* majority justices. In *Rost v. Ford Motor Co.*, 2016 WL 6876490 (Pa. Nov. 22, 2016), those three formed three-fourths of the majority in a ruling that has thoroughly confused the issue in Pennsylvania. While supposedly maintaining adherence to *Betz*, the *Rost* justices held that experts can testify that each exposure is a legal cause of the plaintiff's disease as long as they phrase it differently: "It is the cumulative exposures [all of them] of this plaintiff" that caused the disease. However, there is no meaningful difference between this formulation and the *any exposure* theory. Presumably, no expert in Pennsylvania henceforth will be foolish enough to say "each and every exposure."

The contrast between *Betz* and *Rost* is dramatic and painful—*Betz* disallowed testimony that a lifetime of brake work (40 years or more) is causative. *Rost* permitted virtually identical "cumulative" testimony to support causation for merely three months of work as a "gopher" in a mechanic shop (without performing a single brake job). If the *Rost* court had fairly applied *Betz*, there is no way the *Rost* experts could have testified. The *Rost* panel missed the mark by failing to examine the underpinnings of the *cumulative exposure* theory—including the incorrect and misleading expert (and panel) assertion that "even very low doses of asbestos cause mesothelioma." Instead, the opinion relies almost entirely on citations to the experts' own self-serving statements.

Fortunately, a recent opinion from New York's appellate court got it right. On February 28, the New York Supreme Court, Appellate Division, First Department issued a major ruling that, if applied correctly by trial judges, will greatly reduce the flood of scientifically unsupported asbestos cases in the city's NYCAL docket. See *In re New York City Asbestos Litigation (Juni v. Ford Motor Co.)*, 2017 WL 778358. *Juni* involved a vehicle mechanic who worked for many years on brakes, including Ford parts—a low-level exposure to the weakest form of asbestos. The testifying plaintiff experts ignored more than 20 epidemiological studies finding no link between mechanic brake work and mesothelioma. They also declined to conduct any kind of dose assessment. To avoid exclusion, the experts carefully avoided using the phrase "each and every" exposure while still maintaining that all workplace exposures are causative regardless of dose.

The New York appellate court was not fooled—applying the *Parker* opinion to asbestos litigation, the court upheld the trial court's insightful analysis<sup>4</sup> that rejected *cumulative exposure* testimony because the experts failed to provide a scientific expression of the amount of exposure involved. Relying on the presence of visible dust is insufficient, even if the dust contains some asbestos. The court thus affirmed the dismissal of the type of low-exposure asbestos case routinely but erroneously allowed to proceed in the NYCAL docket previously.

Plaintiffs may attempt to appeal the New York *Juni* opinion. If so, the Court of Appeals should apply its own decisions in *Parker* and *Cornell*<sup>5</sup> and forcefully reject *any exposure* testimony in asbestos litigation. Pennsylvania, which once had settled law, is now in flux. Trial courts there will have to decide which of the two competing decisions (*Betz* or *Rost*) they will apply. The battle to restore asbestos litigation to a rational scientific basis will likely continue for many years to come.

<sup>3</sup> *In re Toxic Substances Cases*, No. A.D. 03-319, 2006 WL 2404008 (Colville, J.) (Pa. Com. Pl., Aug. 17, 2006), *aff'd Betz v. Pneumo-Abex*, 615 Pa. 504, 44 A.3d 27 (2012).

<sup>4</sup> See Michael Hoenig, *Review of Expert Testimony Leads N.Y. Court to Reject 'Single Fiber' Asbestos Liability Theory*, Washington Legal Foundation LEGAL OPINION LETTER, July 10, 2015, available at [http://www.wlf.org/upload/legalstudies/legalopinionletter/HoenigLOL\\_071015.pdf](http://www.wlf.org/upload/legalstudies/legalopinionletter/HoenigLOL_071015.pdf).

<sup>5</sup> *Cornell v. 360 W. 51st St. Realty, LLC*, 22 N.Y.3d 762 (2014).