Asbestos Litigation

Alive and Strong in 2014

By Joseph J. Welter, Susan E. Van Gelder, Andrew J. Scholz, and Sean T. Stadelman

A look at four diverse yet highly connected and relevant topics that raise challenging issues for the defense bar.

Over the past three decades, there have been numerous predictions on when asbestos litigation will end. Yet, it is still here and going stronger than ever.

Many events have shaped and changed the nature of this litigation. Almost 100 companies have filed for bankruptcy due to asbestos litigation. In many cases, these companies established bankruptcy trusts to manage the payment of asbestos claims. Plaintiffs have reacted to these events by pursuing solvent, yet peripheral target defendants. There are now over 10,000 companies that have been named in asbestos lawsuits. Advertising for mesothelioma and lung cancer cases pervades our television as never before. Cases were tried and verdicts taken around the country at a pace of two per month in 2013. One thing is clear: we are far from the end of the road of asbestos litigation.

In this article, we address four diverse yet highly connected and relevant topics that raise challenging issues for the defense bar. We discuss (1) the continued evolution of the "every exposure" or "single fiber" theory across the country, (2) the emergence of multiple distinct exposure lung cancer cases, (3) consolidation of cases and the effect on case values, and (4) trial strategies and challenges for apportioning liability to absent responsible parties.

The "Every Exposure" or "Single Exposure" Theory

What exactly is the "single fiber" or "any and every exposure" theory? Essentially, it is when a plaintiff's expert testifies that each and every exposure to asbestos, no matter how minimal, is a substantial contributing factor to the development of asbestos-related disease. Most, but not all, courts reject this theory as sufficient to overcome specific causation challenges.

Philadelphia, Pennsylvania, has long been one of the hot bed jurisdictions for asbestos litigation. However, the Pennsylvania Supreme Court's recent decision in *Betz v.*

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Pneumo Abex, 44 A.3d 27, 55–58 (Pa. 2012), may stem the tide. In *Betz,* the court rejected the theory that each and every exposure, no matter how small, is substantially causative of asbestos related disease. It held that the theory may not be relied upon as the foundation establishing substantial factor causation. *See id*. Rather, the testimony from plaintiffs' experts must include some reasoned, individualized assessment of the exposure history. *Betz*, 44 A.3d at 55–58. On September 26, 2013, the Pennsylvania Supreme Court reaffirmed that the "each and every exposure" theory was not reliable evidence to establish substantial factor causation for diseases that are dose responsive. *Howard v. A.W. Chesterton*, 2013 Pa. Lexis 2199 (Pa. 2013).

Five years before the Pennsylvania Supreme Court handed down the *Betz* decision, the Supreme Court of Texas rejected the single fiber or every exposure theory of causation in *Borg-Warner Corp. v. Flores*, 232 S.W.3d 765 (Tex. 2007). The *Flores* court explained that "substantial-factor causation, which separates the speculative from the probable, need not be reduced to mathematical precision. Defendant-specific evidence relating to the approximate dose to which the plaintiff was exposed, coupled with evidence that the dose was a substantial factor in causing the asbestos-related disease, will suffice." *Flores*, 232 S.W.3d at 773. The Texas standard is perhaps the friendliest one in the country to defendants.

Even though single fiber or every exposure testimony has been generally held insufficient to establish causation, this does not mean that such testimony is necessarily prohibited at trial. In *Sweredoski v. Alfa Laval Inc.*, 2013 R.I. Super. Lexis 111, the Rhode Island Superior Court held that evidence that a plaintiff's injury was caused by "each and every exposure" to a defendant's asbestos-containing product—without a more specific showing of the "frequency, regularity, and proximity" of such exposure—is legally insufficient to establish proximate causation. However, the court noted that a plaintiff could present "each and every exposure" evidence at trial to establish the inherent dangers of breathing asbestos.

Similarly, a Pennsylvania trial court recently allowed a plaintiff's expert to testify during cross-exam that every breath of asbestos contributes to exposure. *Vinciguerra v. Crane Co.*, Philadelphia Court of Common Pleas, Case No. 100902682 (2013). The court found that the testimony had been elicited by the defense and did not constitute opinion that every breath causes mesothelioma but rather that it was the cumulative effect that causes the disease.

A recent case in Maryland appears to go even further and establishes circumstances under which that jurisdiction will allow the single fiber or any exposure theory. *Dixon v. Ford Motor Co.*, 433 Md. 137 (Md. 2013). In *Dixon,* Maryland's highest appellate court ruled in July 2013 that an expert may testify that "every exposure to asbestos is a substantial contributing cause" of mesothelioma.

While the trend across the country appears to be to dismiss the single fiber or any exposure theory of causation, in some circumstances some jurisdictions will allow such testimony. Defendants must seek to challenge the testimony in *Daubert, Frye,* or similar hearings before trials and consider ways to diminish the utility of such testimony.

The Emergence of Multiple Distinct Exposure Lung Cancer Cases

There is a clear increase of lung cancer-related lawsuit filings across the country, largely driven by plaintiff firms specifically targeting these types of cases. With approximately 200,000 new lung cancer cases diagnosed each year in the United States, some view this as a potential pool of plaintiffs, although many of them may have had minimal potential asbestos exposure.

There seems to be an emergence, or re-emergence, of a distinct type of case during which the plaintiffs affirmatively sue both asbestos defendants and defendants associated with other industrial toxins for different types of industrial exposures, alleging that each distinct exposure led to the development of cancer. For example, in addition to asbestos exposure, a plaintiff may also allege exposure to other industrial carcinogens such as coal tar or coke emissions. Whether you represent a defendant with asbestos ties, or ties to some other alleged toxic emission, the joint pursuit of these different exposures, along with the claim that they independently contributed to a plaintiff's lung cancer, adds a unique layer of complexity to the causation issues and has the potential to shift the dynamic of what otherwise would be a united defense effort to mount a successful causation defense.

Why Is This Happening?

There may be two explanations for these multiple exposure lung cancer claims. First, with the focus on lung cancer cases and a dwindling number of asbestos defendants, plaintiffs' attorneys have an incentive to pursue cases during which they affirmatively claim that a plaintiff's illness was caused by both asbestos and another industrial toxin. From a practical perspective, plaintiffs may be able to increase the collective value of a case by suing different types of defendants in one lawsuit and resolving them for relatively modest individual sums.

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Second, by approaching the cases in this fashion, plaintiffs' attorneys can pursue exposure claims related to other non-asbestos toxins against new defendants in the asbestos-specific courts under the confines of the asbestos case management orders and the expedited trial protocols. This allows plaintiffs' attorneys to develop expertise in new toxic tort areas while litigating those cases in courts and before judges that they know and to fund their new litigation pursuits with settlements from asbestos defendants prone to settle. By adding new defendants with asbestos-free products to the asbestos docket, plaintiffs' counsel effectively force these companies to litigate complex exposure cases involving toxins for which the science on causation has yet to mature, permitting them to bypass the time and extensive

discovery found outside the realm of the asbestos courts.

Can a Plaintiff Meet the Dual Causation Burden?

By combining claims of exposure to asbestos and other carcinogens, plaintiffs are locked into a strategy of offering expert testimony that both exposures were substantially contributing factors to a particular plaintiff's lung cancer. Few courts have addressed whether a plaintiff can affirmatively argue and prove that an alleged exposure-related injury can have two distinct causes. When addressing this issue, courts typically focus on whether the plaintiff's expert proof meets the standard for admissibility.

As one leading practitioner put it, a joint asbestos trial with a punitive damage component against multiple defendants likely creates a *per se* constitutional due process violation.

For example, in *Wills v. Amerada Hess Corp.*, 279 F.3d 32 (2d Cir. 2003), a plaintiff alleged that her husband's death from cancer was caused by exposure to toxic emissions, including benzene and polycyclic aromatic hydrocarbons (PAHs) aboard vessels owned and operated by the defendants. The court found that the plaintiff's expert's proffered testimony on causation was inadmissible because the plaintiff had not proffered evidence from which a reasonable jury could conclude that the decedent's cancer was even partially caused by his alleged exposure to toxins while aboard the defendants' ships. This finding was in part based on the fact that although the expert conceded that cigarette smoking and alcohol consumption were major risk factors for the development of the type of cancer suffered by the decedent, the expert failed to account for these variables in concluding that decedent's cancer was caused by exposure to toxic chemicals such as benzene and PAHs.

The court also excluded the expert testimony in *Cano v. Everest Minerals Corp.,* 362 F. Supp. 2d 814 (W.D. Tex. 2005). The plaintiffs, cancer patients, resided in or worked in an area where the defendants mined uranium. The plaintiffs alleged that their exposure to ionizing radiation from the uranium ore and its decay products caused their cancer, causing them to suffer from various different types of cancer. The plaintiffs' expert's opinion boiled down to a conclusion that once a person developed cancer, all possible causes of cancer in the person were in fact causes and were substantial contributing factors in that particular plaintiff's cancer development. The court reasoned that the fact that exposure to ionizing radiation from uranium *might* be a risk factor for cancer did not make it an actual cause simply because cancer developed. Thus, the court granted the defendants' motion to exclude the plaintiff's expert testimony because it found that in generating his opinion on causation, the expert disregarded the available epidemiological evidence specific to uranium that failed to support a causal link.

How Should an Asbestos Defendant Defend a Multi-Exposure Claim?

In a typical smoking lung-cancer case, an asbestos defendant's primary strategy is to establish that a plaintiff's smoking caused his or her lung cancer and not exposure to asbestos, or alternatively, to apportion as large a percentage of responsibility as possible to smoking. The author will discuss a recent Maryland decision permitting apportionment for smoking below. An asbestos defendant may now face challenges from experts testifying for other industrial toxin defendants offering opinions that asbestos was the sole or primary cause of a plaintiff's lung cancer.

Vetting and selecting the right causation experts is paramount to the defense of such a case. Jointly undertaking a medical work up probably is not an option when a case involves an asbestos defendant and defendants tied to other industrial toxins because their interests may diverge. For an asbestos defendant, retaining its standard go to experts on causation likewise may not be an option if they are unable or unwilling to point to the other toxin as an alternative, if not, sole proximate cause of a plaintiff's injury.

Defense attorneys for asbestos defendants in these situations must be prepared to prove both general and specific causation affirmatively, meaning that a plaintiff was exposed to a quantifiable dose of the toxin that is alleged to have caused the injury, and for a quantifiable duration, such that the exposure was capable of causing that injury. *Parker v. Mobil Oil Corp.,* 16 A.D. 3d 648 (2d Dep't. 2005). Moreover, any defense strategy must include a venue-specific analysis of the case law on the admissibility of expert testimony and the effect, if any, on a plaintiff's causation proof when by a plaintiff's own admission, an injury may have been caused by another toxin. In other words, does the fact that a plaintiff alleges that an injury was caused by two separate toxins affect the admissibility of the proffered expert proof and the ability to prove causation?

Is Severance the Answer?

Severance can serve as an effective tool to assist in apportioning liability to other entities, including increasing plaintiffs' litigation expenses and removing dual-exposure cases from asbestos-specific dockets. *In re: Eighth Judicial District Asbestos Litigation,* 106 A.D.3d 1453, 965 N.Y.S.2d 681 (4th Dept. 2013). Perhaps the greatest benefit of severance, if successful, is that it could allow defendants to apportion liability on alternative causation grounds to defendants that are not at the table to defend their products. With the benefit of an empty chair, and a plaintiff's complaint alleging that a particular injury was in fact caused by two separate, distinct toxins, a defendant may be able to undermine a plaintiff's causation argument effectively at trial.

Trial Consolidation—From Judicial Economy to Severe Prejudice

Over two decades ago and faced with mass filings of asbestos cases, the courts first sought to balance fairness to plaintiffs, on the one hand, by proceeding quickly to trials, and the prejudice that might result to defendants, on the other, when consolidating asbestos cases for single trial. Specifically, the Second Circuit in the seminal case *Malcolm v. National Gypsum Co.,* 995

F.2d 346 (2d Cir. 1993), established a multiple factor test, referred to as the "*Malcolm* factors," for determining whether a joint trial was appropriate, such as whether the plaintiffs had (1) a common worksite, (2) similar occupations, (3) similar time of exposure, (4) similar type of disease, (5) were living or deceased, (6) similar status of discovery, (7) the same counsel, and (8) the type of cancer alleged. The *Malcolm* court carefully scrutinized the above factors as they applied to each of the plaintiff's cases to confirm whether, in fact, any were appropriate for a joint trial.

Who an attorney actually represents in a particular case is pivotal to the attorney's trial strategy.

Fast forward two decades later and a careful review of recent joint trial decisions in New York demonstrates that at least in that jurisdiction, courts now routinely grant joint trials. A review of just one case among many cases shows that these courts either have eroded or ignored the bedrock *Malcolm* factors.

For example, in *Ballard v. Anchor Packing,* 2009 N.Y. Misc. Lexis 5289 (N.Y. Sup. Ct. N.Y. Co. 2009), the plaintiffs sought a joint trial of 12 different cases involving both mesotheliomas and lung cancers. The court granted two joint trials, splitting the cases into lung cancer and mesothelioma trial groups. The court, however, joined living and dead plaintiffs, rationalizing that this "does not factor heavily into the joinder issue, as most people commonly understand these diseases ultimately *may* lead to death." *Id.* (emphasis added). The court also found that a 30-year exposure period for the combined cases did not factor in favor of separate trials because while "there are somewhat different time frames," the time period "need not affect the jury's ability to distinguish 'state of the art' evidence." Finally, the court brushed aside the defendants' cry of unfair prejudice by simply determining that while there was clear prejudice, the prejudice could be overcome by "intelligent management devices" such as juror "note taking." *Ballard,* 2009 N.Y. Misc. Lexis 5289 (any jury confusion and prejudice can be avoided by the use of 'intelligent management devices,' including the encouragement of note-taking by jurors, explanations during the trial as to the limited use of evidence, and special verdict forms."). The *Ballard* decision, moreover, reflects the analysis made by many other courts that have come to the same conclusion under similar sets of facts. *See, e.g., Collura v. A.O. Smith Water Prods.,* 2005 N.Y. Misc. Lexis 1987 (N.Y. Sup. Ct. N.Y. Co. 2005) (unless the cases are consolidated, "the Courts are simply incapable of handling litigation of such volume"); *DiBenedetto v. Abex Corp.,* 2010 N.Y. Misc. Lexis 1225 (N.Y. Sup. Ct. N.Y. Co. 2010) (combining living and dead cases involving 40-year exposure period involving both foreign and domestic job sites in different occupations); *In re N.Y.C. Asb. Lit.,* 2011 N.Y. Misc. Lexis 2248 (N.Y. Sup. Ct. N.Y. Co. 2011) (combining eight cases despite fact that all had different work sites and occupations, involved both living and dead, and diagnosed with different diseases); *Assenzo v. A.O. Smith Water Prods.,* 2013 N.Y. Misc. Lexis 1630 (N.Y. Sup. Ct. N.Y. Co. 2013) (consolidating 15 cases into three trial groups).

How Much Worse Can It Get?

As if $190 million verdicts weren't bad enough, plaintiffs now seek punitive damages in jurisdictions that for years never permitted such damages at trial. However, if the courts ever consider such a scenario, the plaintiffs will have gone too far. As one leading practitioner put it, a joint asbestos trial with a punitive damage component against multiple defendants likely creates a *per se* constitutional due process violation. *See* James M. Beck, Consolidation in Product Litigation, DRI Product Liability Seminar (Sept. 2011).

What Should a Defendant Do if Faced with a Potential Joint Trial?

Every asbestos defendant understands that it must carefully expend its resources on any given case due to mass asbestos filings. The fight against a joint trial, however, is one of the most critical battles in the case. Therefore, every procedural tool must be used and every argument must be made at the trial court level to avoid a joint trial. A defendant must remind a trial court to stay true to the original purpose of *Malcolm*. For example, a defendant must fight the notion that joining living and dead cancer cases together is appropriate since medical science has advanced to such a degree that some cancers, such as lung cancers and colon cancers, have longer survival rates and are not an automatic death sentence. A defendant should not refrain from attacking the judicially created notion that "smart management devices," such as juror note taking, avoids juror confusion. Clearly, the jury that rendered the $190 million verdict must have taken bad notes. While the battle on the trial court level may be difficult, a record must be made so that an immediate appeal, and hopefully a stay of a trial, can be effectuated. In short, if defendants universally fight this battle, the courts hopefully will realize that something more must be done to protect the defendants' rights.

Trial Strategies and Challenges in Apportionment Jurisdictions

As discussed in the previous sections, preparing and trying an asbestos case has become more complex and challenging as a result of the single fiber causation issues, claimed dual exposures, and joint trials. These trends have brought to the forefront issues about how to develop an effective trial strategy to apportion responsibility to third parties and in turn limit a particular client's proportional responsibility.

What Role Should Apportionment Play in a Trial Strategy?

Those who have litigated asbestos cases understand that each case is to some extent distinct and proving alternative shares is not necessarily a trial strategy to use in each case. For example, defending a smoking lung-cancer case when a plaintiff claims to have been exposed in 1946 to automotive engine gaskets is a very different case from defending an amphibole insulation distributor in a mesothelioma case when a plaintiff was a pipe coverer in the early 1970s. In the gasket case, the trial strategy may not rest at all on other potential shares but rather on smoking as the sole cause of a plaintiff's illness, and to a lesser extent, a state of the art defense. On

the other hand, if an insulator in the 1970s directly handled a client's amphibole product on a daily basis, the facts may put a defense attorney in damage control mode to minimize a client's apportioned responsibility. For these reasons, defense counsel must initially assess whether to use an apportionment trial strategy at all. Additionally, if an apportionment strategy is in play, myriad possible scenarios will dictate what the proof burden will be at trial and how to meet that burden. The discussion to follow is a springboard from which to devise an effective trial strategy.

Why Getting Companies on the Verdict Sheet Is Not Enough

There is an inherent conflict between adamantly defending a client at trial on the basis that its product did not cause a plaintiff's illness and arguing that responsibility should be apportioned to other absent responsible parties. Striking the right balance at trial is the trick. In many cases, the strategy is to offer minimal proof of alternative exposure to "make the record" to justify placing names on the verdict sheet, knowing that this is an argument of last resort if a jury rejects the main defenses. However, meeting the burden of proof to add names to the verdict sheet is distinct from meeting the burden of persuasion to convince a jury actually to assign percentages of fault.

For example, in *Dummitt v. A.W. Chesterton*, 36 Misc. 3d 1234(A), 960 N.Y.S.2d 51 (N.Y. Sup. Ct., N.Y. Cty. 2012), the defendant met its burden of proof but not its burden of persuasion. In this case, the jury was asked three questions: (1) was the plaintiff exposed to asbestos products made, sold, distributed or applied by the nonparty defendants; (2) did any of those companies fail to exercise reasonable care by not providing an adequate warning about the potential hazards of exposure to asbestos; and (3) were those companies' failure to warn a substantial factor in causing the plaintiff's mesothelioma. Of the 32 companies that appeared on the verdict sheet, only 18 remained after the first question was answered. After the second question was answered, only two companies were still in play for apportionment purposes. The jury was simply not persuaded that the defendant arguing to apportion responsibility met its proof burden.

In contrast, in *Keeney v. AW Chesterton*, 2013 Cal. App. Unpub. Lexis 5205 (July 24, 2013), John Crane went to trial in California and successfully persuaded a jury to assign 70 percent responsibility to the U.S. Navy, 13 percent to another defendant, five percent to the plaintiff, and 12 percent to John Crane. On appeal, the plaintiff argued that John Crane did not meet its burden on apportionment. The court rejected the argument, stating: "The jury thus was instructed to apportion liability to an entity if it found the entity was at fault and that entity's fault was a substantial factor in causing Keeney's harm. As discussed above, there is substantial evidence to support the jury's findings of fault and allocation of liability."

These cases demonstrate two different results even though both defendants met their respective apportionment burdens of proof. However, in *Dummitt*, the defendant did not persuade the jury to apportion liability to most of the companies that exposed the plaintiff to asbestos. Simply meeting the burden of proof is not an acceptable apportionment strategy goal. Thoroughly working up a case and completely working the apportionment analysis needs to be done to develop the best apportionment trial strategy and ultimately to meet the burden of *persuasion* by actually convincing a jury to apportion fault.

What Is the Burden to Establish Alternative Shares?

At trial, a defendant in an asbestos case has the same burden as a plaintiff would have to establish liability against absent but potentially responsible parties. For example, in California in a strict liability case, the "defendant has the burden to establish plaintiff was exposed to defective asbestos-containing products of other companies, that the defective designs of the other companies' products were legal causes of the plaintiff's injuries, and the percentage of legal cause attributable to the other companies." *Sparks v. Owens-Illinois, Inc.*, 32 Cal. App. 4th 461. Similarly, for example, in New York in a negligence claim, "[t]he negligence of a nonparty defendant was a significant cause of plaintiff's injuries and that defendant had met its burden of showing the proper amount of the equitable shares attributable to the other companies." *Lustenring v. AC&S, Inc.*, 13 A.D.3d 69, 786 N.Y.S.2d 20; *Matter of New York Asbestos Litig. v. John Crane, Inc.*, 28 A.D.3d 255; *Matter of New York City Asbestos Litig.*, 36 Misc. 3d 1234A. As explained below, there are some interesting overlaps between a defendant meeting this burden and a pure causation argument that other exposures to asbestos or other toxins either solely caused or contributed to a plaintiff's illness.

What Types of Proof Are Available to Meet that Burden?

The single most important source of proof in an asbestos case to establish alternative shares comes directly from a plaintiff. Developing the proper record during discovery in a plaintiff's deposition is imperative for a defendant to meet its burden at trial to establish exposure to and inhalation of asbestos fibers. There is, however, a natural tension among defendants' counsel who, in all candor, each have the same responsibility to establish alternative exposure. Each counsel should theoretically be attempting to minimize his or her client's exposure and at the same time maximize other sources of exposure, especially since it is unlikely that all of the defendants present during the deposition stage will remain once a trial begins. In some jurisdictions, such as Pennsylvania, this task is made easier because plaintiff's counsel will elicit deposition testimony from a plaintiff regarding asbestos exposure due to sources linked to sued defendants, and this testimony should be sufficient to meet a defendant's burden at trial regarding alternative exposures.

One often overlooked defense opportunity is to develop a deposition record of other undisclosed or unacknowledged asbestos exposures unrelated to any of the sued defendant. All too often, a plaintiff's testimony is skewed toward blaming the sued defendants to the exclusion of other potential exposures that do not provide a source of recovery. Questioning regarding the identity of bankrupt entities has become commonplace, although in many cases a defense attorney will not spend enough time during a deposition teasing out the detail of that exposure and maximizing its significance. Moreover, questioning about undisclosed activities may yield helpful results. For example, if a plaintiff claims to have been exposed only

to automotive gasket materials in connection with weekend work on cars, an attorney should routinely ask questions, such as did you ever work on or were you present around boilers, roofing, or drywall, among other things. Quite often, these probing questions will uncover other sources of exposure. Unless these questions are asked during discovery, it will be highly unlikely that the trial counsel will be able to make a sufficient record of alternative exposures for apportionment purposes at trial.

Aside from a plaintiff's testimony, another equally important source of proof comes from a plaintiff's interrogatory answers and the pleadings themselves. Defendants should be allowed to rely on these admissions at trial. In September 2013, the Supreme Court of Georgia reached this precise conclusion in *Fields v. Georgia-Pacific* (Sept. 9, 2013). In this case, the plaintiff included in her complaint statements that she was exposed to asbestos from products manufactured and distributed by a number of defendants, and she subsequently withdrew those allegations after she resolved her claims with those defendants. Nevertheless, the court held as follows: "A mesothelioma plaintiff's allegations in her complaint that she was exposed to asbestos manufactured or distributed by numerous companies were admissions, and were admissible evidence under *OCGA §24-8-821*, even when withdrawn, and the manufacturers remaining in the suit could use these admissions as evidence that fault should be apportioned."

Other sources through which a defendant can meet its burden at trial regarding alternative exposure include a plaintiff's medical experts, questioning them to elicit causation testimony regarding alternative exposure; one or more co-defendant's discovery responses; a plaintiff's liability experts, questioning them to elicit testimony regarding absent responsible parties knowledge, bankruptcy proof of claims documents, and a client's experts.

Who Do You Represent?

The evolution of asbestos litigation has resulted in a diverse and varied array of defendants. Who an attorney actually represents in a particular case is pivotal to the attorney's trial strategy. Does an attorney represent (1) an asbestos product manufacturer, (2) a local distributor, (3) a supplier of raw asbestos, (4) an equipment manufacturer with purely an exterior insulation claim, (5) a local insulation contractor, (6) a valve manufacturer with claimed gasket and packing exposure, or (7) a brake defendant? Who a defense attorney represents and how a jury perceives that company in comparison to other absent companies is an important consideration. How a jury may perceive a large amphibole asbestos insulation manufacturer or distributor attempting to apportion liability to a local contractor will be different than the local automotive parts distributor shifting responsibility to a raw asbestos supplier. Who a defense attorney represents coupled with the facts of the case is critical to how aggressively to use an apportionment strategy.

What Are the Presented Exposure Scenarios?

All potential apportionment targets are not the same. The burden of proof against a premises owner for failing to protect workers will be definitively different than the burden against a manufacturer for a defective product. While there are hundreds of potential exposure and apportionment combinations, this article will consider five typical apportionment scenarios.

The first and perhaps the most common apportionment scenario is apportioning responsibility for unrelated alternative exposure. This perhaps would work, for example, with an industrial worker who did drywall work on the side. These would be two unrelated exposures during that plaintiff's career, which is a relatively simple strategy to use.

The second and third apportionment scenarios can be grouped together as the upstream and downstream apportionment scenarios. Upstream apportionment relates to the same claimed exposure when, for example, a defense attorney represents a local insulation contractor and would seek to shift partial responsibility to the distributor or manufacturer of the product installed by the attorney's client. Conversely, downstream apportionment involves shifting responsibility from, for example, a local product distributor to a premises owner or installer related to the same product.

The fourth apportionment scenario involves one exposure, but views it differently focusing on different legal considerations. For example, in defending a pump manufacturer against an exterior insulation claim an attorney would attempt to shift responsibility for bystander insulation exposure to the contractor installing the insulation on the pump. In this scenario, the focus of the legal responsibilities is different, which will drive how a strategy would attempt to convince a jury to shift, in whole or in part, legal responsibility to the absent party for the same exposure.

The fifth apportionment scenario involves other comparable manufacturers or distributors. This would perhaps involve a plaintiff who testified that he worked as mechanic for his whole life and used asbestos-containing products manufactured by three different companies, and would involve assigning a percentage of the time to each product that he used over the years without more specific detail. Technically, these could be considered unrelated exposures because they presumably occurred at different times, but the manner in which a plaintiff combined the product identification places them in a different category and in all likelihood predetermines what the assigned percentages should be.

In many cases, a defense attorney will face a combination of all these scenarios along with unique permutations of each when defending even one defendant. From a trial analysis perspective, each alternative exposure should be parsed and separately analyzed to identify the different burdens of proof for each and to develop a strategy that will meet both the burden of proof and the burden of persuasion.

Dilemmas of Unacknowledged Exposure or No Apportionment Target

As discussed above, a defendant's burden at trial would be to show plaintiff was exposed to an asbestos-containing product that caused or contributed to his or her illness other than the asbestos tied to the defendant. Meeting this burden is a challenge in a variety of circumstances.

The first is when a plaintiff has identified a likely alternative asbestos exposure but will not concede so on the record. For example, a plaintiff testified that he worked with roofing shingles in the 1960s but will not concede that the product actually contained asbestos. Should a jury be able to infer from the time period alone that the

shingles contained asbestos for apportionment purposes? If a plaintiff would not survive summary judgment against a roofing shingle manufacturer, why should a jury be permitted to apportion responsibility based on a defendant's submission of that same proof? In this scenario, a defendant needs to either develop additional proof or eliminate that exposure from the apportionment analysis.

Another challenging scenario is when a plaintiff concedes asbestos exposure but cannot identify the manufacturer. From a causation perspective, there is no doubt there is alternative exposure. However, how does a defendant meet the burden of showing that the nonparty was negligent or sold a defective product when that nonparty cannot be identified? Could testimony from state of the art experts meet a defendant's burden sufficiently? How would that exposure appear on a verdict sheet in absence of a named company? Some jurisdictions may permit unknown companies to appear on a verdict sheet as alternative exposures. Whether a jurisdiction will do so may substantially affect an apportionment strategy.

What About Exclusions to Limitations of Joint and Several Liability?

In some jurisdictions, the limitations afforded to defendants on joint and several liability contain exclusions when a defendant's conduct is found to be reckless or intentional. This is a particularly important consideration when a client's proportional responsibility is relatively small. Even an effective apportionment strategy can be substantially undermined.

For example, in April 2013, Crane went to trial in New York City and put on a very successful apportionment strategy, persuading the jury to apportion 15 percent to Crane, with the remaining 85 percent responsibility distributed among 20 other responsible parties. However, the jury also found Crane to have acted in reckless disregard for the safety of others, which effectively eliminated New York's limitation on joint and several liability protections for noneconomic damages. In contrast, in October 2012, Crane tried a case in Buffalo, New York, where the jury found it to be 4 percent responsible, with the remainder of the responsibility apportioned to 16 of the 18 other potentially responsible parties. However, the jury found Crane not to have acted recklessly. The lesson is that effective trial apportionment strategies, as with all other trial strategies, carry inherent risks that could undermine them.

Conclusion

Asbestos litigation is definitely alive and going strong. Some companies have taken the lead in preparing and trying asbestos cases over the last two years, which has and will continue to include challenges to plaintiffs' theories. In 2014 and in the future, we should expect to see additional decisions on the issues discussed in this article, along with other emerging issues. FD