

# The National Forum for Environmental & Toxic Tort Issues (FETTI)

## Winter/Spring 2016 Case Law Update Newsletter

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.

### **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 sued 14 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 statute 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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