

October 7, 2008

In a much anticipated ruling, the Philadelphia Court of Common Pleas barred plaintiffs' experts in three asbestos cases from offering testimony that "each and every exposure to asbestos" is a substantial contributing factor in asbestos-related toxic tort actions. The Frye hearing arose from a Motion for a Frye Hearing filed by Defendant Chrysler LLC and joined in by Defendants Ford Motor Company, General Motors Corporation and Honeywell Corporation. The court's decision pertains specifically to three asbestos cases: *Caswell v. A.W. Chesterton, Inc., et al.*, 0609-0782; *Duke v. Chrysler LLC, et al.*, 0612-3451; and *Fisher v. A.O. Smith Corp., et al.*, 0608-2483.

As a preliminary measure, Judge Allan L. Tereshko noted that a finding by the court that the proffered scientific methodology is novel is a prerequisite to precluding expert testimony under Frye. The court concluded that the defense had raised legitimate questions about the general acceptability of the methodologies of the plaintiffs' experts, and then critiqued the methodology of each of the experts, including Eugene Mark, M.D.; William Longo, Ph.D.; Arthur Frank, M.D. and Jonathan Gelfand, M.D. The court noted that each of plaintiffs' experts opined that exposures to brake dust were a substantial factor in causing each of the plaintiffs' asbestos-related diseases. However, the methodology employed by each of these experts was found to be in-existent or "inherently contradictory." The court contrasted the methodologies of these experts with the experts called by the defense, which included Dennis Paustenbach, Ph.D.; Mary Jane Teta, Dr.P.H.; Al Franzblau, M.D. and Patrick Hessel, Ph.D.

Judge Tereshko held that in the absence of epidemiological studies, the experts' "assumptions" that each breath of asbestos is a substantial contributing factor to the "causation of asbestos disease" is nothing more than an "illusion of methodology" and cannot meet the scrutiny of Pennsylvania's Frye standard. Plaintiffs' experts' methodology started with a conclusion and then searched for a claimed methodology to support their conclusion. Each of plaintiffs' experts essentially relied upon their belief that each and every exposure contributed to the plaintiffs' diseases. The court found further that plaintiffs' experts' opinions were "made without any apparent consideration of frequency, regularity and proximity" of the asbestos exposure in contravention to the Pennsylvania Supreme Court's recent decision in *Gregg v. V. J. Auto Parts Company*, 2007 Pa. LEXIS 2935 (Pa. 2007).

In addition to pointing out the fallacy of the "methodology" employed by plaintiffs' experts, the court noted that plaintiff's experts failed to account for differences in the type and nature of asbestos fibers. In summing up, Tereshko noted "[t]he opinions proffered by plaintiffs' experts that each and every exposure to asbestos causes or contributes to the disease without an explanation of the contribution [of] background exposure is flawed necessarily because of this omission."

Judge Tereshko specifically noted that "not all asbestos exposure causes disease" since everyone is exposed to some ambient level of asbestos. Consequently, under the court's ruling, it appears that an expert must be able to specifically link a defendant's asbestos-containing product to a plaintiff's asbestos-related disease, through the use of epidemiology, which is the primary scientific method for determining causation. Because plaintiffs' experts lacked such support for their opinions, the court precluded them from testifying.

The ruling may significantly weaken a plaintiff's claims against tertiary asbestos defendants, such as automobile companies and other friction materials manufacturers.

Philadelphia partner Sharon Caffrey, co-chair of the Products Liability and Toxic Torts division of Duane Morris' [Trial Practice Group](#), participated in the Frye hearing on behalf of two of the defendants involved.

For Further Information

If you have questions about this Alert or would like more information, please contact [Sharon L. Caffrey](#), any other [member](#) of the [Products Liability and Toxic Torts Practice Group](#) or the attorney in the firm with whom you are regularly in contact.