RECENT DEVELOPMENTS IN TOXIC TORT LITIGATION

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There are a number of interesting ongoing issues in toxic tort litigation, both statewide and nationwide. Perhaps of most interest statewide is the issue whether Alabama will continue to adhere to the date of last exposure accrual rule for most non-asbestos toxic tort cases. Nationwide, the greater issues appear to be the continuing efforts by inventive plaintiffs' counsel to identify the next asbestos, as well as the continued strong scrutiny of expert testimony in toxic tort cases.

The Date of Last Exposure Rule.

In *Garrett v. Raytheon Co., Inc.*, 368 So. 2d 516 (Ala. 1979), the Supreme Court of Alabama held that in a radiation exposure personal injury case, the injury occurred and the cause of action accrued for statute of limitations purposes on the date on which the plaintiff was last exposed to radiation. *Id.* at 520-521. In doing so, the *Garrett* court relied upon its decision in *Garren v. Commercial Union Insurance Co.*, 340 So. 2d 764 (Ala. 1976), a workman's compensation case in which the court held that "[t]he date of injury is the date on which plaintiff was exposed to the danger." *Id.* at 766. That holding was required by the language of Title 26, § 313(42) of the *Alabama Code*, which defined the date of

an exposure injury in the worker's compensation context as "The date of the last exposure to the hazards of the disease which gave rise to the injury." *Id.* at 765. This is still the accrual rule for most occupational disease workman's compensation claims. *See* ALA. CODE § 25-5-117(b) (1975). Significantly, this is the only definition the Alabama Legislature has ever enacted relative to the date on which a claim for latent injury accrues.

The *Garrett* court invited the Alabama Legislature to adopt a different accrual rule for toxic tort cases, if it believed that to be necessary:

> It may be that Alabama's rejection of the "Discovery Rule" is contrary to the weight of opinion generally. However, as this Court is committed to the proposition that the legislature has the inherent power to establish statutes of limitation, we have no other alternative than to leave it to the legislature to abrogate this rule and adopt a more equitable one should it see fit, so that a plaintiff's claim will not be barred when he has no way to ascertain that he has been damaged by a deleterious substance because the result has not manifested itself until the statute of limitations has run.

Garrett, 368 So. 2d at 521.

But the efforts of the Alabama Legislature to adopt a discovery accrual rule applicable to non-asbestos toxic tort actions[1] were not successful. The legislature quickly adopted Act No. 79-468, a comprehensive piece of product liability legislation that included a discovery accrual rule:

[1] The Alabama Legislature carved out asbestos injuries from other latent injuries and in 1980 it passed Act No. 80-566, which amended § 6-2-30 of the *Alabama Code* to incorporate a discovery accrual rule in asbestos exposure cases, and that Act was upheld prospectively in *Tyson v. Johns-Manville Sales Corp.*, 399 So. 2d 263 (Ala. 1981).

> Where the personal injury . . . (i) either is latent or by its nature is not discoverable in the exercise of reasonable diligence at the time of its occurrence, and (ii) is the result of ingestion of or exposure to some toxic or harmful or injury-producing substance, element, or particle, including radiation, over a period of time . . . the product liability action claiming damages for such personal injury, or property damage must be commenced within one year from the date such personal injury or property damage is or in the exercise of reasonable diligence should have been discovered by the plaintiff or the plaintiff's decedent. . . .

ALA. CODE § 6-5-502(b) (1979). Unfortunately, the legislature chose to include a ten year statute of repose in the Act, and to provide that the provisions of the Act were not severable, such that if one portion of the Act were to be deemed unconstitutional, the entire Act would be unconstitutional. When the court declared the repose provision unconstitutional in *Lankford v. Sullivan, Long & Haggerty*, 416 So. 2d 996 (Ala. 1982), the date of last exposure rule remained as the accrual rule for toxic tort cases in Alabama.[2]

And the rule has remained in effect since then. Despite repeated challenges, the Supreme Court of Alabama has consistently reaffirmed the date of last exposure rule as the accrual rule for toxic tort causes of action. *See Becton v. Rhone-Poulenc, Inc.*, 706 So. 2d 1134 (Ala. 1997) (carbon disulfide exposure); *Johnson v. Garlock, Inc.*, 682 So. 2d 25 (Ala. 1996) (asbestos); *Hubbard v. Liberty Mut. Ins. Co.*, 599 So. 2d 20 (Ala. 1992) (tungsten carbide);

[2] The Alabama Legislature certainly knows how to enact legislation that incorporates a discovery accrual rule, for it has done so in numerous pieces of legislation. *See e.g.*, ALA. CODE §§ 6-2-30(b) (asbestos exposure litigation); 6-5-482(a) (medical malpractice actions); 6-5-574(a) (legal service liability actions).

Hillis v. Rentokil, Inc., 596 So. 2d 888 (Ala. 1992) (chromated copper arsenate); *American Mut. Liab. Ins. Co. v. Phillips*, 491 So. 2d 904 (Ala. 1986) (cotton fibers); *Tyson v. Johns-Manville Sales Corp.*, 399 So. 2d 263 (Ala. 1981) (asbestos). In addition, since *Garrett*, the Supreme Court of Alabama has also repeatedly rejected requests that it adopt a discovery accrual rule applicable to toxic tort and other causes of action. *See Boyce v. Cassese*, 941 So. 2d 932, 946 n. 2 (Ala. 2006); *Payton v. Monsanto Co.*, 802 So. 2d 829, 835 (Ala. 2001); *Travis v. Ziter*, 681 So. 2d 1348, 1354 (Ala. 1996); *American Mut. Liab. Ins. Co. v. Phillips*, 491 So. 2d 904, 906 (Ala. 1986); *Moon v. Harco Drugs, Inc.*, 435 So. 2d 218, 220 (Ala. 1983); *Ramey v. Guyton*, 394 So. 2d 2, 4 (Ala. 1980). It appears clear that the Supreme Court of Alabama is not the place to go to request that a discovery accrual rule be adopted to replace the date of last exposure rule in toxic tort cases.

Cline v. Ashland

Jack Cline worked for many years at Griffin Wheel Company, a Bessemer plant that manufactured railroad car wheels using a high-temperature furnace process. Mr. Cline worked as a chemist for Griffin Wheel from 1979 to 1987, and he contended that over that eight year period he periodically used pure benzene to clean oxygen valves.[3] He was diagnosed with acute myelogenous leukemia in 1999, and he filed a personal injury lawsuit within two years thereafter.

[3] Cline's claimed benzene exposure was generally limited to 20 minutes per week over this eight year period.

The defendants moved for summary judgment on a variety of procedural and substantive grounds, including the statute of limitations. Cline conceded that he had not filed his lawsuit within two years of the date he was last exposed at Griffin Wheel, but he contended that he had experienced a recent exposure to benzene in a product supplied by one of the defendants,[4] And he argued in this regard that since his Complaint was timely as to one defendant, it was timely as to all defendants. The trial court rejected the latter argument and granted summary judgment, invoking the date of last exposure rule to conclude that Mr. Cline's tort claims were barred by the two year statute of limitations.

In his appeal to the Supreme Court of Alabama, Cline complained that there was never a time when he could have filed his action, based upon his interpretation of the Supreme Court of Alabama's 2001 decision in *Hinton v. Monsanto Co.*, 813 So. 2d 827 (Ala. 2001). In *Hinton,* the court held that a "manifest, present injury" is required to be alleged before an action seeking exposure-related medical monitoring costs could proceed. *Id.* at 828-29. Thus, Cline argued that his action would have been barred by the "manifest, present injury" rule if he had timely filed it, and was barred by the date of last exposure rule when he waited until he had a diagnosed illness before filing a lawsuit. The problem with this argument, of course, is that the "manifest, present injury" rule

[4] Mr. Cline periodically used Thompson's Water Seal in connection with moonlighting work he did building decks, and he used it less than two years before filing the lawsuit. He contended that the product, which was manufactured by defendant Thompson & Formby, Inc., contained benzene. Thompson & Formby, Inc. entered into a *pro tanto* settlement agreement with Cline while the summary judgment motion was pending.

that he claims would have barred his lawsuit if it had been timely filed, did not exist in 1987 through 1989,[5] the period within which he could have timely filed a lawsuit arising out of his benzene exposures at Griffin Wheel. Instead, the controlling law at that time was set forth in *Garrett*: "the damage must have occurred at the time of exposure" and "[t]he injury occurred on the date or dates of exposure." *Garrett*, 368 So. 2d at 520. Mr. Cline did not have standing to make the argument he presented; that argument must await a plaintiff whose timely lawsuit is dismissed because he could not allege a manifest, present injury.

On October 14, 2005, the Supreme Court of Alabama issued its first no-opinion affirmance. Following the filing of an application for rehearing, the Court heard oral argument and solicited *amicus curiae* briefs from the Business Council of Alabama and Alabama Trial Lawyers Association. On January 5, 2007, the Court issued its second no-opinion affirmance, but this time it was a 5-4 decision with two separate concurrences and a dissent. Justice See concurred specially to emphasize his view that it is up to the legislature to change the law if it is to be changed, because the decision "depends upon a weighing of competing public policies" that the legislature is better able to accomplish than the courts. *Cline v. Ashland, Inc.*, 2007 WL 30070, *2 (Ala. 2007) (See, J. concurring specially). Chief Justice Nabors and Justice Stuart joined in this concurrence. Justice

[5] None of the cases that *Hinton* cited for the "manifest, present injury" rule was a personal injury case, and all were decided after 1995, more than six years after the statute ran on Mr. Cline's claim.

Smith, joined by Justice Bolin, separately concurred to express her similar view that the legislature is the appropriate body to determine whether the date of last exposure rule should be abolished. *Id.* at *5-7 (Smith, J., concurring specially). Justice Harwood wrote a lengthy dissent, in which he was joined by Justices Lyons, Woodall, and Parker. After tracing the historical development of the date of last exposure rule, Justice Harwood proposed that the Court adopt an accrual rule for toxic tort actions such that "a cause of action accrues only where there has occurred a manifest, present injury." *Id.* at *19 (Harwood, J., dissenting). Significantly, however, Justice Harwood acknowledged that the "creation of a discovery rule lies within the province of the legislature." *Id.* at *20.

After Cline's second application for rehearing was denied by the Supreme Court of Alabama, his widow[6] filed a Petition for a Writ of Certiorari in the United States Supreme Court on April 3, 2007. In that petition, she presents the question whether Alabama's interpretation of its statute of limitations violates the Due Process Clause of the Fourteenth Amendment to the *United States Constitution*. In their brief in opposition filed on May 1, 2007, respondents contend that the Supreme Court does not have jurisdiction to review the question presented, and that there is in any event no compelling reason for the Court to review the decision of the Supreme Court of Alabama. At the May 10 deadline for this paper, petitioner's reply brief had not yet been filed.

[6] Mr. Cline died on January 17, 2007.

The Alabama Legislature has not ignored the situation, but it has not yet enacted legislation to accomplish any change to the date of last exposure rule. Past legislative sessions have seen bills presented by not passed, most recently Senate bills 534 and 535 in the 2006 legislative session. In the current legislative session, there are again two bills pending that would, if either were to be enacted, abolish the date of last exposure rule for toxic tort cases in Alabama. The first bill, SB205, would amend § 6-2-30(b) of the *Alabama Code* to retroactively remove the reference to asbestos therein so as to adopt a discovery accrual rule for all causes of action "resulting from exposure to any toxic substance. . . ." The second bill, SB206, would amend Section 95 of the *Alabama Constitution* to permit the legislature to revive rights or remedies arising out of exposures to toxic substances that may have become barred before the injured party was entitled to bring an action asserting the right or remedy. Each of these bills was assigned to the Senate Judiciary Committee, and no action had been taken on either bill as of the May 10 deadline for this paper.

Tuscaloosa County Circuit Court Cases

There are two cases pending in the Circuit Court of Tuscaloosa County that may well give the Supreme Court of Alabama a second and possibly a third opportunity to again review the date of last exposure rule. Each of the cases was filed by the same attorney who now represents Jack Cline's widow, and each was filed with a view toward squarely challenging the date of last exposure

rule or, possibly, creating an exception to that rule in certain wrongful death actions. In *Griffin v. King*, Civil Action No. CV-2006-216 (Cir. Ct., Tuscaloosa County), plaintiff filed her wrongful death lawsuit within two years after her decedent's death, thus ostensibly meeting the wrongful death action statute of limitations. *See* ALA. CODE § 6-5-410. Her Complaint alleged that her decedent acquired acute myelogenous leukemia (the disease that claimed his life) as a result of benzene exposures that he experienced while working at a tire plant in Tuscaloosa. Plaintiff conceded in her Complaint that decedent was last exposed to benzene at the plant more than two years prior to his death, which would appear to bar the claim as a matter of law since he therefore was not "able to bring an action without the bar of limitations as a defense had he . . . lived." *Id.*; *see also Spain v. Brown & Williamson Tobacco Company*, 872 So. 2d 101, 112 (Ala. 2003); *Hall v. Chi*, 782 So. 2d 218, 221 (Ala. 2002).

But plaintiff has invoked the decision of the Supreme Court of Alabama in *Pace v. Armstrong World Industries, Inc.*, 578 So. 2d 281 (Ala. 2001), in support of an argument that her wrongful death action is not barred because, at the time of his death, decedent could have filed a timely personal injury action in Georgia arising out of his benzene exposures.[7] *Pace* held, somewhat differently, that when a decedent has filed a timely personal injury action in some other state *prior to his death*, the Alabama Wrongful Death Act does not preclude a transfer

[7] Georgia has a discovery accrual rule for personal injury actions for latent injuries arising out of chemical exposures.

of that action to Alabama or the conversion of that action to an Alabama wrongful death action once transferred. *Id.* at 285. Mr. Griffin did not file such a lawsuit before his death. A hearing is scheduled on May 30, 2007 on all pending motions, so there may be news to report during the June 15 presentation at Sandestin.

The second Tuscaloosa County case is *Hinton v. King*, Civil Action No. 2007-140 (Cir. Ct. Tuscaloosa County), another benzene exposure case from the same Tuscaloosa tire plant. Mr. Hinton is still alive, and his lawsuit is claimed to present the question that was appealed but then abandoned in *Cline*: If an injured plaintiff can prove that he was exposed to benzene supplied by one defendant within the two year period preceding the filing of his Complaint, will that exposure be sufficient to keep his claims alive against other defendants whose products he was last exposed to far more than two years before such filing? A Case Management Order has been entered by Judge Malone in this case with the intent and expectation that any and all motions for summary judgment based on the statute of limitations will be filed by October 31, 2007, and will be heard on December 3, 2007.

The Next Asbestos

Inventive plaintiffs' counsel continue to look for the next asbestos. While it is not clear what is the next asbestos, it is becoming very clear what it is not.

A. *Trace benzene litigation* – Since benzene exposure, at a sufficient level of exposure for a sufficient duration, has been associated with acute myelogenous leukemia, there is no shortage of cases in which AML victims have sued or are suing benzene producers or suppliers, or producers or suppliers of products that may contain trace quantities of benzene. *Cline, Griffin,* and *Hinton* are current examples of such cases. Such cases have not been successful for the most part, and they likely will continue to be unsuccessful, because even the most favorable epidemiologic studies suggest that there is no basis for a causal association between benzene exposure and AML unless the plaintiff has had a cumulative benzene exposure in excess of 80 ppm-years. The more consistent studies, and those with statistical significance, suggest that the minimum level necessary for a valid causal association is between 200 and 400 ppm-years. Unless there are new and different epidemiologic findings, benzene will not be the next asbestos. This is especially true with regard to non-AML benzene exposure cases, where plaintiffs can only hope to distort science to reach the jury.

B. *Lead pigment litigation* – So far, most of the noteworthy lead pigment litigation has been filed by governmental entities. A February 22, 2006, jury verdict in favor the State of Rhode Island required three lead pigment manufacturers to clean 300,000 houses containing lead-based paints. Both before and since that verdict, municipalities across the country have sued such

manufacturers, usually on a public nuisance theory. This will be an important area of toxic tort litigation to watch over the coming years, but there is a greater likelihood that it will generate property damage claims than it will generate personal injury claims.

C. *MTBE litigation* – Methyl Tertiary Butyl Ether is a component of gasoline that has been claimed to be associated with a variety of human illnesses. It would be fair to say, in this area, as in many toxic tort areas, plaintiffs' experts are well ahead of the science. That is, they say and believe things that the epidemiologic studies do not confirm. There is a federal MDL for MTBE, and proceedings there will bear watching. *In re Methyl Tertiary Butyl Ether Prod. Liab. Litig.*, MDL No. 1358 (So. Dist. NY).

D. *Welding rod litigation* – There is also an MDL for welding rod litigation, and the first two trials in that MDL resulted in defense verdicts. *See In re Welding Fume Prods. Liab. Litig.*, MDL No. 1535 (N.D. Ohio, June 27, 2006 [Solis] and November 30, 2006 [Goforth and Quinn]). Those plaintiffs who have pursued their welding fume exposure claims in state court have had no greater success. *See e.g., Haskell v. Lincoln Electric Co.*, No. 04-L-1152 (Cir. Ct., Madison County, Illinois) (defense verdict on 11/15/06); *Godwin v. Lincoln Electric Co.*, No. 03-cv-0801 (Dist. Ct., Galveston County, Texas) (defense verdict on 11/15/06).

E. *Silica* – Silica exposure claims, once promised to be the new asbestos, have faired poorly since Judge Jack's June 30, 2005 opinion excoriating plaintiffs' counsel, their experts, and their methods, in the Silica MDL. *See In re Silica Prods. Liab. Litig.*, MDL No. 1553 (S.D. Texas, June 30, 2005). Judges in Mississippi and Florida have taken Judge Jack's opinion to heart and have dismissed thousands of silica exposure cases where plaintiffs were either relying upon the experts or the screening companies discredited by Judge Jack's opinion.

F. *Mold* – There has been a proliferation of mold cases around the country, but it would be fair to say that property damage claimants are fairing far better than are personal injury claimants. This is so because it is easy to see and evaluate mold damage to property, while the role that mold plays in producing human illness remains controversial. While there are experts available who will associate virtually any symptom with past exposures to mold,[8] those opinions are generally contrary to generally accepted science. *See Jazairi v. Royal Oaks Apt. Assocs.*, 2007 WL 460843 (11th Cir., February 13, 2007) (affirming exclusion of expert testimony associating mold exposure with lung ailment); *Kilian v. Equity Residential Properties Trust*, 191 Fed. Appx. 537 (9th Cir. 2006). Mold litigation will not become a significant contributor to toxic tort litigation unless or until the science changes.

[8] Indeed, there is one available "expert" who has developed his own two-tier nine-component diagnostic protocol for diagnosing "chronic biotoxin-associated illness." Be aware that the opinions of this expert, Dr Ritchie C. Shoemaker, have been excluded by trial courts in Florida, Alabama, and Virginia.

Expert Testimony

The past year has been another tough one for plaintiffs' experts in toxic tort cases. Courts around the country have continued to employ *Daubert* as the standard for scrutinizing the admissibility of expert testimony in toxic tort cases. In many cases, expert testimony has been excluded because such testimony cannot be demonstrated to amount to scientific knowledge.

In addition to the *Jazairi* and *Kilian* decisions referenced above, there have been four other federal circuit court decisions over the past year that affirmed the exclusion of expert testimony in toxic tort cases as scientifically unreliable. *See Knight v. Kirby Inland Marine, Inc.*, ___F.3d ___, 2007 WL 795676 (5th Cir., March 19, 2007) (affirming exclusion of opinion associating benzene exposure with Hodgkins' Lymphoma and bladder cancer); *Rolen v. Hanson Beverage Co.*, 193 Fed. Appx. 468 (6th Cir. 2006) (affirming exclusion of opinion associating stomach problems with consumption of juice products); *Marmo v. Tyson Fresh Meats, Inc.*, 457 F.3d 748 (8th Cir. 2006) (affirming exclusion of opinion associating hydrogen sulfide gas exposures with plaintiff's symptoms); *Korte v. Exxonmobil Coal USA, Inc.*, 164 Fed. Appx. 553 (7th Cir. 2006) (affirming exclusion of opinion associating plaintiff's injuries with airborne coal dust exposures).

Over the past year, the federal district courts have taken a similar dim view of unreliable expert testimony in toxic tort cases. *See Cunningham v. Master*

Wear, Inc., 2007 WL 1164832 (S.D. Ind., Apr. 17, 2007) (excluding opinions associating plaintiffs' symptoms with exposures to perchloroethylene); *Jacobs v Caesar's Entertainment, Inc.*, 2007 WL 594714 (E.D. La., Feb. 21, 2007) (excluding opinion associating death with listeria exposure); *Kropp v. Maine School Administrative Union*, 471 F. Supp. 2d 175 (D. Me. 2007) (excluding opinion ascribing plaintiff's symptoms to phenol sensitivity); *Benkwith v. Matrixx Initiatives, Inc.*, 467 F. Supp. 2d 1361 (M.D. Ala. 2006) (excluding variety of expert opinions associating plaintiff's illness with her use of nose spray); *Amico v. Duracel Cement*, 2006 WL 2319313 (D.N.J., Aug. 9, 2006) (excluding opinion associating exposure to quick drying cement with plaintiff's symptoms); *Doe v. Ortho-Clinical Diagnostics*, Inc., 44 F. Supp. 2d 465 (M.D. N.C. 2006) (excluding opinion associating child's autism with Thimerosol exposure).

All of the foregoing decisions continue a trend that has been ongoing since *Daubert* was decided in 1993. Too often, it appears, plaintiffs' counsel develop causal association theories for which they can hire expert support but for which such experts have no legitimate scientific support. These lawsuits will continue to be the favorites of defense counsel.

CONCLUSION

Toxic tort litigation continues to be an interesting area. In the very near future we will certainly learn whether there is any constitutional impediment to the continued enforcement of the date of last exposure rule, and we will learn

whether the Alabama Legislature will take action to abolish or modify that rule to any extent. In any event, toxic tort actions will continue to be filed, medical causation will continue to be the primary arena in such cases, and there will be much for good lawyer to do in such cases.