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## Asbestos

### **Multi-Source Asbestos Exposure Cases: When Words Really Matter**

**C**ausation continues to be one of the most heavily litigated issues in asbestos suits, especially when more than one source of exposure to cancer-causing substances is involved.

In a case involving an industrial worker who alleges his exposures to both asbestos-containing products and smoking caused his lung cancer, the Seventh Circuit is now considering whether a trial court correctly excluded a key causation expert.

The linchpin of the issue in Charles Krik's suit is whether his expert drew the inadmissible conclusion that Krik's "every exposure" to toxins could have caused his cancer, or if the testimony permissibly concluded the cancer was caused by "cumulative exposure" (*Krik v. Exxon Mobil Corp.*, 7th Cir., No. 15-CV-3112, oral argument 12/6/16).

"Cumulative exposure" considers whether all sources combined could have caused the disease, while the "each and every" theory considers if each individual exposure—even to a single asbestos fiber—is a substantial contributing cause, according to Krik's appeals brief.

A pretrial ruling in the case forbade solicitation of "each and every" testimony.

Asbestos litigation is the longest-running and most expensive mass tort in U.S. history. With other suits like Krik's pending, much more than just semantics are at stake.

#### **Did Court Conflate Concepts?**

"The overwhelming majority of courts accept the scientific truth that cumulative exposure causes disease," Jonathan Ruckdeschel of the Ruckdeschel Law Firm in Ellicott City, Md., told Bloomberg BNA. Ruckdeschel is an asbestos plaintiffs' attorney not directly involved in the Seventh Circuit case.

But in Krik's case, the trial judge got it wrong by conflating the two concepts and lumping all of the expert's testimony in the inadmissible "every exposure" camp, Ruckdeschel said. "In this case, the trial court was misled by the defense presentation," he told Bloomberg BNA.

"Krik was exposed to one of the dustiest products in the world," Ruckdeschel said. "So to suggest that a single fiber had anything to do with the Krik case is absurd."

**Distinction 'Nonexistent.'** But the Coalition for Litigation Justice, a group of insurers that filed a friend of the court brief in the case, says the "supposed distinction between any exposure and cumulative exposure, other than the name, is nonexistent."

The plaintiff's attorneys in Krik's case are attempting to draw an artificial line between "cumulative" and "any exposure" to try and overturn Judge Manish Shah's exclusion of their main causation testimony, the group says in its brief.

Exxon Mobil Corp., one of two corporate defendants in the case, agrees.

"Judge Shah correctly ruled that [Krik's] 'cumulative exposure' theory was mere sophistry," the company said in its own brief.

Charles Krik worked for decades as a pipefitter and boilerman. He also smoked a pack-and-a-half of cigarettes a day for thirty years. After being diagnosed with lung cancer in 2008, Krik sued multiple parties, including Exxon Mobil and Owens Illinois Inc., alleging his occupational exposure to the asbestos-laden products on their work sites was a synergistic cause of his cancer.

Krik's medical expert, Dr. Arthur Frank, sought to testify at trial that Krik's cumulative workplace exposures to asbestos was a substantial contributing factor in causing his disease.

But Judge Shah, citing a pretrial ruling and Frank's testimony at trial, wouldn't allow it.

In that earlier ruling, the judge initially assigned to the case said that, based on Frank's inability "to quantify the extent of" Krik's asbestos exposure, Krik couldn't introduce "any expert testimony espousing the 'any exposure' theory, 'each and every exposure' theory, and the 'single fiber' theory at trial."

At trial, Frank admitted during questioning outside of the presence of the jury that he believes every exposure to asbestos fibers is a substantial contributing factor to the cumulative exposure that causes cancer.

Based on that answer, and the pretrial ruling, Judge Shah sustained defense objections when Krik's attorneys asked Frank about his methodology and opinion on the cause of Krik's cancer.

The trial judge also barred Frank from answering when Krik's lawyers asked him whether exposures to asbestos while working for Exxon Mobil or Owens Illinois would have contributed to Krik's illness.

Krik's attorneys said that distinction was significant and Frank should have been allowed to offer his opinion to the jury about the "cumulative" cause of Krik's cancer based on the totality of his workplace exposures at Exxon Mobil and Owens, his medical records and his smoking history.

**Not Relevant.** Counsel for Krik told Bloomberg BNA Judge Shah got it wrong.

“Judge Shah found that because Dr. Frank held the inadmissible opinions about every exposure within the cumulative exposure being a cause, Dr. Frank’s causation opinion had to be excluded,” Krik’s attorney Robert McCoy, with Cascino Vaughan Law Offices in Chicago, told Bloomberg BNA.

“But cumulative exposure isn’t relevant to the specific defendants,” he said.

“Dr. Frank said cumulative exposure is the cause of asbestos related disease. He didn’t say it was connected to his opinions on Owens and Mobil. It has nothing to do with whether each individual exposure is a cause.”

“The admission of Dr. Frank’s causation opinion is based on evidence about the exposures for each defendant such as asbestos content, duration, proximity, visible dust, scientific literature about causation, medical studies of similar exposures, latency period, and other evidence,” McCoy said.

“Although Dr. Frank holds an opinion which is not admissible and was not presented to the jury, the issue is whether there is sufficient other basis in the record for admission of his causation opinion.”

**‘Re-Packaging.’** But the defendants say the trial court got it right and that the “cumulative exposure” theory in this case is simply a “repackaging” of “every exposure.”

“Dr. Frank’s repackaging of his testimony to attempt to provide Mobil specific opinions did not succeed,” Exxon Mobil argued in its brief.

“Dr. Frank’s failure to consider dose is at the heart of his failure to satisfy the *Daubert* admissibility test regardless of whether he calls it ‘any fiber’ or a ‘cumulative exposure’ theory,” ExxonMobil said.

In *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993), the Supreme Court set forth the test for courts to apply in evaluating the reliability of expert evidence.

The Coalition for Litigation Justice agrees that the issue turns on dose.

“Under the any exposure theory, no individual, non-background exposures can be eliminated from causation because they all supposedly contributed to the burden of asbestos in the lungs,” it said.

“Under the cumulative theory, no individual, non-background exposures can be eliminated because supposedly each of them cumulatively contributed to the lung burden.”

“Both theories avoid and do not rely on any estimation of the dose involved from an alleged exposure,” the group of insurers said.

Defense attorney Knight Anderson with Tucker Ellis LLP in Cleveland says the *Daubert* issues raised by Krik and other cases are important.

Anderson devotes a large part of his practice to products liability, mass tort and toxic tort matters, including asbestos defense.

“It is plaintiff’s burden to prove that a defendant was a substantial factor in causing the disease and allowing plaintiffs to meet that burden with unscientific generalizations improperly reverses that burden of proof,” Anderson said.

“An expert opinion blaming all exposures because one can’t say which exposure in fact caused it or because you can’t exclude any exposure as a possible cause is not a reliable scientific methodology, no matter what language one uses to describe it.”

**A ‘Strawman.’** Asbestos plaintiffs’ attorney Gilbert Purcell with Brayton Purcell LLC in Novato, Calif., says the “each and every” characterization of the testimony that Krik sought to introduce in this case is a “strawman.”

“Defendants say that there has to be some minimum level of exposure and the plaintiffs haven’t proven it. That’s a mischaracterization of the science,” Purcell, who has been following the case, said. “Total latent aggregate dose is not ‘each and every.’”

“Cumulative exposure is the correct model for carcinogenesis; the pathway by which a carcinogen brings about cancer,” he said. “Cumulative exposure is French for ‘total latent aggregate dose’ of carcinogens.”

**Not a Low Dose Case.** Ruckdeschel, the other plaintiffs’ lawyer who’s looked at the case, says it’s significant that the Krik case isn’t a low-dose or single fiber case.

“The expert wasn’t relying on the abstract concept of ‘each and every.’ He wasn’t saying all exposures, no matter how slight will be a substantial contributing factor,” Ruckdeschel said. “The allegedly defective testimony came out on cross-examination: If the disease was caused by cumulative exposure, then all exposures contribute to the disease. That’s the scientifically accepted truth.”

“But Dr. Frank was not asked if one fiber was a substantial contributing factor,” Ruckdeschel said. “While hypothetically possible, he didn’t say it ever happened.”

Oral argument in the case is set for December 6, 2016.

Counsel for Exxon Mobil and Owens did not respond to requests for comment.

Johnson & Bell represents Exxon Mobil.

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By PETER HAYES

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