Portfolio Media. Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Pseudo-Science Of 'Each-And-Every Exposure' Asbestos Claim

Law360, New York (February 20, 2013, 5:53 PM ET) -- Plaintiffs in mesothelioma cases typically sue numerous former manufacturers of asbestos-containing products — even defendants to whose products there is very little, if any, evidence of exposure — on a theory that "each and every" exposure to asbestos, no matter how small, contributed to causing the fatal cancer.

Since its inception in the early 1970s, plaintiffs in asbestos litigation have offered this theory as a justification for sidestepping the known variation in carcinogenic potency associated with different asbestos exposures, based on the product and asbestos fiber type at issue, the duration and intensity of exposure and other relevant factors — all of which support the exclusion of certain exposures as causally significant — in favor of a legally advantageous contention that every occupational exposure to asbestos collectively and cumulatively contributes to causing the disease.

Plaintiffs' causation paradigm has proven particularly effective for asbestos plaintiffs in jurisdictions that continue to recognize joint and several liability, where low-exposure defendants can be held responsible for the entirety of plaintiffs' alleged injuries.

On its face, plaintiffs' causation theory has a seemingly scientific facade: Every exposure contributes to a person's lifetime cumulative exposure to asbestos, and it is the "total and cumulative exposure" that "causes" the disease. But there is no actual science to support this concurrent causation claim.

Plaintiffs and their experts attempt to conceal this glaring deficiency behind a smoke screen of references in the scientific literature, stating only what amount to a series of nonsequiturs: that mesothelioma is a "dose-response" disease, that all types of asbestos are capable of causing mesothelioma, that asbestos is the only known cause of mesothelioma and that there is no known safe level of exposure below which mesothelioma cannot occur in some sensitive, but as-of-yet unidentified, human population.

However, in the face of defendants' evidentiary challenges that have pulled back the curtain behind plaintiffs' conclusory causal assertions, the theory has been exposed for what it is — a semantic sleight of hand promoted by plaintiffs to shift the burden of proof to defendants. Indeed, while clothing their opinion in the word "cause" to describe the role of a plaintiff's cumulative lifetime asbestos exposures, plaintiffs' experts actually mean nothing more than that they cannot rule out the possibility that each exposure individually could have played a role in plaintiff's disease.

Such testimony falls well short of the traditional common law, more-likely-than-not causation standard in tort cases as evidenced by a spate of recent rulings by courts from jurisdictions around the country holding just that, including courts in Georgia, Louisiana, Texas, Maryland, Virginia, Nevada, Ohio and Pennsylvania.[1]

On Jan. 18, 2013, the U.S. District Court for the District of Utah joined these courts by granting a Daubert motion to exclude expert opinion testimony that "every exposure to asbestos by a human being who is later afflicted with mesothelioma, contributed to the formation of the disease." Smith v. Ford Motor Co. et al. (D. Utah Jan. 18, 2013).

The district court's ruling in Smith is another reflection of the growing intolerance of courts for special "asbestos-only" legal standards that litter asbestos litigation jurisprudence and fuel the asbestos-litigation industry.

Background

The Smith case involves a mesothelioma decedent, Ronnie Smith, who worked as a part-time service station attendant at a gas station in Cedar City, Utah, between August 1966 and May 1968. Although Smith testified that he "didn't know for sure" how many times he had performed brake pad replacements — an alleged source of low-level exposure to chrysotile asbestos fibers — his executor (the named plaintiff in Smith) argued that Smith may have done so on up to seven occasions on Ford vehicles. Id.

Plaintiffs' medical expert, Dr. Samuel Hammar, opined that these seven exposure episodes were substantial factors in bringing about plaintiffs' cancer "based on a theory of causation that has variously been described as the 'every exposure' and the 'every breath' theory, which holds that each and every exposure to asbestos by a human being who is later afflicted with mesothelioma, contributed to the formation of the disease." Id.

The Trial Court's Ruling

Granting Ford's motion to exclude Hammar's "each and every" exposure opinion, the court found, "Dr. Hammar's opinion is, as a matter of law, unsupported by sufficient or reliable scientific research, data, investigation or studies, and is inadmissible under" the prevailing standards governing the admission of expert testimony in federal courts set forth in Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993), and its progeny.

In reaching this conclusion, the court noted its agreement with "the growing number of published opinions from other courts that have reached a similar result: that the every exposure theory as offered as a basis for legal liability is inadmissible speculation that is devoid of responsible scientific support. When carefully examined, it becomes clear that Dr. Hammar's proffered testimony is precisely the kind of testimony the Supreme Court in General Electric Co. v. Joiner ... observed as being nothing more than the 'ipse dixit of the expert.'" Id. (quoting 522 U.S. 136, 146 (1997)).

The each-and-every exposure theory amounts to nothing more than the ipse dixit — the because-I-said-so — of its proponents because the theory is fundamentally premised on the concept that because no individual exposure to asbestos purportedly can be ruled "out" as having participated biologically in the development of mesothelioma, all exposures therefore must be ruled "in" as causal factors.

Such a theory "asks too much from too little [scientific] evidence as far as the law is concerned. It seeks to avoid not only the rules of evidence but more importantly the burden of proof" that asbestos plaintiffs carry to present sufficient evidence that exposure to asbestos from each defendant's product was a substantial factor in causing their alleged injuries. Id. at *3. Indeed, the Smith court aptly compared the each-and-every exposure theory to:

> a homicide detective who discovers a murdered man from a large family. Based on his and other detectives' training and experience the detective knows that family members are often the killer in such cases. When asked if there are any suspects the detective says he cannot rule out any of the murdered man's relatives. This would be reasonable, but it would not allow the detective to attribute legal liability to every family member on the basis of such a theory.

Id. In sum, even crediting asbestos plaintiffs' oft-cited adage that "there is no known minimum dose of asbestos that is required to cause cancer in a human being," the court concluded, "Dr. Hammar's testimony does virtually nothing to help the trier of fact decide the all-important question of specific causation. His opinions are based solely on his belief that he should not rule out any exposure as a contributing cause." Id. at *4.

The district court's observations in Smith highlight the disconnect between the conclusory causation pronouncements offered by plaintiffs' experts in asbestos litigation on one hand and the scientific evidence upon which those opinions purport to rely on the other. Often, these experts espouse the each-and-every exposure opinion notwithstanding concessions that the likelihood that any particular exposure to asbestos biologically participates in causing mesothelioma is extremely remote and highly dependent on the intensity and duration of the exposure as well as the physical and chemical properties of the asbestos fibers at issue.

Plaintiffs avoid addressing these issues by simply recasting their burden of proof under the guise of the each-and-every exposure theory.

Nevertheless, juries are not asked whether it is possible that a particular exposure participated in bringing about the plaintiff's disease but rather whether the exposure more probably than not was a substantial causal factor.

To meet this standard, plaintiffs must establish much more than the mere fact of an exposure. They must provide evidence that the exposure was significant enough (e.g., by reference to its relative contribution to plaintiff's total risk of mesothelioma) to permit a scientifically supported inference that it more likely than not participated in a substantial way in bringing about the disease.

Smith continues a long line of recent decisions upholding that standard and laying bare the legal and scientific deficiencies of the each-and-every exposure theory.

--By Craig Woods, Herb Zarov and Matt Provance, Mayer Brown LLP

Craig Woods and Herb Zarov are partners, and Matt Provance is an associate at Mayer Brown, where the authors are members of the firm's Product Liability and Mass Torts Practice Group. They represent defendants in asbestos litigation. Mr. Woods specializes in expert related work, including bringing and defending against expert testimony admissibility challenges under Daubert/Frye.

The opinions expressed are those of the author and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] See, e.g., Betz v. Pneumo Abex LLC, 44 A.3d 27 (Pa. 2012); Dixon v Ford Motor Co., 47 A.3d 1038 (Md. App.), cert. granted, 55 A.3d 906 (2012); Robertson v. Doug Ashby Building Materials et. al., No. 532769 (17th J.D.C. E. Baton Rouge, La. Aug. 17, 2012); Moeller v. Garlock Sealing Techs. LLC, 660 F.3d 950, 952 (6th Cir. 2011); Butler v. Union Carbide Corp., 712 S.E.2d 537 (Ga. App.), cert. denied (2011) ; Borg-Warner Corp. v. Flores, 232 S.W.3d 765, 774 (Tex. 2007); Ford Motor Company v. Boomer (Va. Jan. 10, 2013); Holcomb v. Georgia Pacific LLC, 289 P.3d 188 (Nev. 2012).