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Asbestos

Asbestos Litigation In California: The Creation And Retroactive Application Of Special, Expansive, Asbestos-Only Rules Of Liability — Part Two

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Commentary

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INTRODUCTION

In the first installment of this four part series describing the special rules applicable to asbestos cases in California, we focused on the relaxed, risk-based causation rule adopted by the California Supreme Court in *Rutherford v. Owens Illinois*, 16 Cal. 4th 953 (1997). We described *Rutherford*'s departure from the common law requirement that the plaintiff prove that it is more likely than not that an exposure to the defendant's toxin actually participated in the disease process. And we noted that some California appellate courts have diluted the already relaxed *Rutherford* rule, permitting recovery based upon testimony that the risk of asbestos disease is attributable to a plaintiff's aggregate occupational exposure, that the aggregate exposure is the sum of individual exposures, and that each and every exposure is therefore a substantial factor under the *Rutherford* test.

In this installment, we examine in greater depth the ways in which misinterpretation of *Rutherford* by California appellate courts has led to the effective abandonment of any meaningful requirement for proving causation in California asbestos litigation. We analyze modifications that the *Rutherford* Court made to its initial opinion in response to a petition for rehearing that demonstrate beyond peradventure that the diluted version of *Rutherford* set forth in *Izell v. Union Carbide Corp.*, 231 Cal. App. 4th 962, 977 (2014) and similar cases is simply wrong. We show as well that the diluted version of the *Rutherford* test relies on a misreading of a single sentence of *dictum* in *Rutherford* that cannot be reconciled either with the changes the California Supreme Court made in response to the petition for rehearing or with the body of its opinion. We note that *Izell* and the cases it purports to follow have effectively adopted the single fiber theory of causation—a theory rejected by the majority of courts across the country. And we argue that the result is an asbestos-only causation standard that imposes liability on defendants so long as there is some possibility, however remote, that the defendant caused plaintiff's harm, with no requirement that the plaintiff prove that it is more likely than not that the defendant's product either caused plaintiff's injury or that exposure to defendant's product contributed substantially to the risk that plaintiff would contract his asbestos-related disease.

A. The History Of the *Rutherford* Litigation In The California Supreme Court Makes Clear That The *Izell* Line Of Cases Has Misconstrued The *Rutherford* Test

The history of the *Rutherford* litigation in the California Supreme Court makes crystal clear that the

California Supreme Court did not intend to adopt the kind of meaningless "any exposure" causation standard set forth in the *Izell* line of cases. In three different places in its initial August 28, 1997 opinion the Court held, in identical language, that a plaintiff could prove causation simply by showing that "in reasonable medical probability [the exposure] **contributed to the plaintiff or decedent's *risk*** of developing cancer." 16 Cal. 4th at 982-83 (bold added, italics in original); *id*. at 977 (same), *id*. at 979 (same).[1] Owens-Illinois then filed a petition for rehearing in which it argued that this language was "problematic" because it could be "read to mean that *any* quantum of risk produced by a particular exposure or act can be a 'legal cause' of an injury; no matter how small, medically improbable, or insignificant a contribution to the *cause* of the injury the exposure or act made, liability would be imposed." 1997 WL 33559697 at *2 (emphasis in original). Owens-Illinois pointed out that evidence that a toxin could not be ruled out as a causative agent because it increased the risk of disease proved only that it was *possible* that the toxin had caused the disease and that California courts, including several cases that *Rutherford* cited with approval, had properly held that the mere possibility that a toxin caused defendant's harm was not enough to establish proximate cause. *Id*. at *9.

Owens-Illinois argued that the notion that proof of *any* increase in risk attributable to exposure to defendant's product meets plaintiff's *Rutherford* burden was "totally inconsistent with the Court's reasoning in its opinion." *Id*. at *3. In support, Owens-Illinois noted that the Court had identified the critical question as "whether the risk of cancer created by a plaintiff's exposure to a particular asbestos-containing product was *significant enough* to be considered a legal cause of the disease." *Id*. at *8 (quoting *Rutherford*, 16 Cal. 4th at 975). And it cited "the Court's central (and correct) conclusion" that "in asbestos related cancer cases, a particular asbestos-containing product is deemed to be a substantial factor in bringing about the injury if its contribution to the plaintiff or decedent's *risk or probability* of developing cancer was substantial." *Id*. at *8 (quoting *Rutherford*, 16 Cal. 4th at 975) (emphasis in original *Rutherford* opinion). Owens-Illinois concluded by asking the Court to modify the thrice-repeated "problematic language" in the original Opinion to make clear that proof of *any* contribution to risk was not enough and that the contribution to risk attributable to a particular exposure had to be *substantial*.

On October 22, 1997, the *Rutherford* Court issued a modified opinion that did exactly what Owens-Illinois requested. The Court modified each of the three sentences that Owens-Illinois had identified as problematic, changing the description of the plaintiff's burden of proof from showing merely that the "exposure contributed to the plaintiff or decedent's *risk* of developing cancer" to proof that the exposure was "a *substantial factor* contributing to the plaintiff's or decedent's risk" of disease. 16 Cal. 4th at 983-83 (emphasis added); *see also id*. at 977, 979. As to what contribution to risk would be sufficient to constitute a substantial factor, the Court left intact all of the language that Owens-Illinois had identified as inconsistent with the conclusion that *any* contribution to risk was enough, including the clear and direct statement that an exposure is not significant enough to be deemed a legal cause unless its contribution to risk was substantial. The California Court of Appeal's conclusion in *Izell* and similar cases—that "opinion testimony by a competent medical expert to the effect that every exposure to respirable asbestos contributes to the risk of developing mesothelioma," *Izell*, 231 Cal. App. 4th at 977, meets plaintiff's causation burden under *Rutherford*—is simply impossible to reconcile with the *Rutherford* Court's modification of its initial opinion.

B. The *Izell* Line Of Cases Confuses Contribution To Risk With Contribution To Cause

As additional support for its holding, the appellate court in *Izell* also relied—as had all of the published and unpublished post-*Rutherford* California appellate court cases that have adopted the "every exposure/any risk" theory—on *dictum* from *Rutherford* that "[t]he substantial factor standard is a relatively broad one, requiring only that the contribution of the individual cause be more than negligible or theoretical." *Izell*, 231 Cal. App. 4th at 975-76 (citing *Rutherford*, 16 Cal. 4th at 978). These cases have concluded that proof that an exposure contributed to *risk* in more than a negligible or theoretical way meets plaintiffs' *Rutherford* burden. This reasoning confuses contribution to *cause* (actually participating) with contribution to *risk* (possibly participating) and thereby improperly conflates the traditional substantial factor test applicable in non-asbestos cases with the new, asbestos-only, *Rutherfor*d test.

It is true that that the traditional substantial factor test is met if the plaintiff proves that the contribution of an actual, "but for" *cause* of injury is more than negligible or theoretical. It is not true, however, and the *Rutherford* Court never said, that legal cause may be proved by showing that an exposure contributed to *risk* in more than a negligible or theoretical way. The traditional test applies where the plaintiff can prove actual cause: that is, that the defendant's product actually participated in the disease process. As *Rutherford* explained, California courts have long held that it is a misuse of the substantial factor test for a defendant "**whose conduct is clearly a 'but for' cause of plaintiff's injury"** to escape liability on the ground that its contribution to the injury, as compared to others', was "insubstantial." *Rutherford*, 16 Cal. 4th at 969 (emphasis added). Thus, a defendant whose product was a "but for" cause of an injury cannot avoid liability entirely unless its product "play[ed] only an 'infinitesimal' or 'theoretical' part in bringing about injury, damage or loss." *Id.*

This traditional test, however, says nothing about the standard that applies where, as in the *Izell* line of cases, plaintiffs had not argued that the defendants' asbestos was a "but for" *cause* of plaintiff's disease, but rather had sought to take advantage of the relaxed *Rutherford* test based on contribution to risk. Under *Rutherford*, a plaintiff may meet the causation requirement by proving that exposure to defendant's asbestos was a "*substantial* factor contributing" to the plaintiff's risk of contracting mesothelioma. *Rutherford*, 16 Cal. 4th at 977. But to meet that burden, plaintiffs must provide a sufficient characterization of the nature and extent of plaintiff's exposure to the defendant's product in the context of his exposure to other asbestos sources—for example, by considering the frequency, intensity, and duration of the exposure as well as the relative toxicity of the defendant's product—to permit a jury to conclude that the contribution to risk attributable to that product was substantial. *Id.* at 975. The expert testimony that *Izell* and related cases found sufficient plainly fails to meet the actual *Rutherford* test.

C. California Appellate Courts Have Not Applied *Rutherford* Consistently

To be sure, not all California appellate courts have followed the *Izell* line of cases and their evisceration of the *Rutherford* test. The recent decision in *Pfeifer v. John Crane, Inc.*, 220 Cal. App. 4th 1270 (2013) is a case in point.

In *Pfeifer*, the plaintiff had worked at the Navy yards where he was exposed to asbestos and asbestos-related products manufactured by multiple defendants. On appeal, John Crane did not quarrel with the jury's finding that its asbestos-containing products were a substantial factor in causing the plaintiff's disease. It argued, however, that the jury should have allocated comparative fault to other parties in light of (i) the plaintiff's admissions that he had been exposed to those parties' asbestos-containing products and (ii) Pfeifer's attorney's argument at closing that he had proved that exposure to John Crane's asbestos had caused plaintiff's injury because his experts had testified that every exposure increases the risk of disease and is therefore a substantial contributing factor. The court rejected this argument for two reasons. First, it found that plaintiff's experts had not relied on the every exposure theory. *Pfeifer*, 220 Cal. App. 4th at 1288 n.1. Second, it noted that John Crane had failed to meet its burden under *Rutherford* of proffering expert testimony "*quantifying* Pfeifer's exposure to asbestos from other sources," 220 Cal. App. 4th at 1286 (emphasis added), or "regarding the size of the 'dose' or the enhancement of risk attributable to exposure to asbestos from the defendant's products," *id.* at 1287 (citing *Rutherford*, 16 Cal. 4th at 976, n.11).

To state the obvious, the different interpretations of what *Rutherford* requires in *Izell* and *Pfeifer* cannot be harmonized or reconciled. Plaintiffs' attorneys have argued that *Pfeifer* is distinguishable from *Izell* because the former applied *Rutherford* in the context of a *defendant's* claim that exposures to another party's asbestos products had contributed to causing plaintiff's mesothelioma. It is true that no published opinion of which we are aware has ever applied the *Izell* approach to a defendant's claim that exposure to another party's asbestos was a substantial contributing factor. But *Rutherford* cannot fairly be applied one way to plaintiffs and another to defendants.[2] For all the reasons we have set forth above, a plaintiff in a California asbestos case should be required to prove that exposure to a defendant's asbestos or asbestos-containing product substantially contributed to the risk of his or her disease. At a minimum, however, the California appellate courts should not further tilt the playing field in plaintiffs'

favor by interpreting *Rutherford* as imposing a higher standard of proof on defendants than on plaintiffs.

D. The California Supreme Court Should Revisit Asbestos Causation Issues And Overrule *Rutherford*, Or, At A Minimum, Make Clear That It Is Plaintiff's Burden To Prove That The Risk Of Disease Attributable To Exposure To Defendant's Asbestos Is Substantial

No court in any other state has ever adopted *Rutherford*'s permissive, risk-based standard as a valid test for assessing asbestos causation, and at least one court has specifically rejected it. *See*, *e.g.*, *Holcomb v. Georgia Pacific LLC*, 289 P.3d 188, 194 (Nev. 2012) (declining to adopt the *Rutherford* causation test because it "does not strike the proper balance, as its extraordinarily relaxed nature does not afford enough protection for manufacturers that may not have caused the resulting disease").

Moreover, a growing number of courts have expressly considered and rejected the construction of *Rutherford* adopted in subsequent California appellate court decisions: that every occupational exposure, regardless of extent or the presence of other more extensive and/or dangerous exposures, may be a substantial contributing factor of asbestos-related disease. *See*, *e.g.*, *Moeller v. Garlock Sealing Technologies, LLC*, 660 F.3d 950, 954-55 (6th Cir. 2011) (fact of exposure alone does not satisfy the substantial factor requirement as traditionally defined); *Gregg v. V-J Auto Parts Co.*, 943 A.2d 216, 226-27 (Pa. 2007) (declining "to indulge in a fiction that each and every exposure to asbestos, no matter how minimal in relation to other exposures, implicates a fact issue concerning substantial factor causation"); *Butler v. Union Carbide Corp.*, 712 S.E.2d 537, 552 (Ga. App. 2011) (finding that the " 'any exposure theory' is, at most, scientifically grounded speculation: an untested and potentially untestable hypothesis"); *Smith v. Ford Motor Co.*, 2013 U.S. Dist. LEXIS 7861, *7(D. Utah Jan. 18, 2013) (the any exposure theory "asks too much from too little 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."); *Bostic v. Georgia-Pacific Corp.*, 439 S.W.3d 332, 338 (Tex. 2014) ("proof of 'some exposure' or 'any exposure' alone will not suffice to establish causation"); *Krik v. Crane Co.*, — F.Supp.3d. — 2014 U.S. Dist. LEXIS 175983, *12 (N.D. Ill. Dec. 22, 2014) (the method behind the any exposure theory "is not an acceptable approach"); *Matter of New York City Asbestos Litig.*, — N.Y.S.3d —, 2015 N.Y. Misc. LEXIS 1168, *53 (N.Y. Sup. Ct. Apr. 13, 2015) ("the experts' theory that a cumulative and unquantified exposure proves causation . . . is contrary to accepted science"); *Sclafani v. Air and Liquid Systems Corp.*, 2013 WL 2477077, at *4-5 (C.D. Cal., May 9, 2013) (testimony that each and every exposure is a substantial factor excluded as not meeting *Daubert* standard).

It is particularly important that the California Supreme Court revisit the way some appellate courts are applying the *Rutherford* causation test because the lower courts' dilution of the already relaxed *Rutherford* test is having, and will continue to have, a significant unfair impact on defendants dragged into the maw of California asbestos litigation. As we have said, the principal sellers of asbestos and asbestos-containing products long ago declared bankruptcy and exited the tort system. In their absence, plaintiffs' lawyers have cast their net widely and ensnared an estimated 8,000 additional defendants. See Paul D. Carrington, *Asbestos Lessons: The Unattended Consequences of Asbestos Litigation*, 26 Rev. Litig. 583, 593 (2007). The vast majority of these defendants were peripheral players in the asbestos industry.

Yet under the current regime, any of these 8,000 defendants may be found liable even in the absence of any evidence that (i) it is more likely than not that asbestos fibers from their products participated in the disease process (the traditional common law standard), or (ii) that the contribution to plaintiff's risk of disease attributable to exposure to defendant's product was substantial (the relaxed *Rutherford* standard). Putting aside the adverse effect on the economy of driving many of these remaining companies into bankruptcy, there is serious question whether application of special rules to asbestos defendants comports with due process or equal protection principles when those rules are retroactively applied only to sellers of asbestos products and where, as here, their application permits finding liability on a showing of the mere *possibility* that the defendant is responsible for plaintiff's harm. The time has come for the California Supreme Court to reconsider whether asbestos plaintiffs should be relieved of the common law causation requirements applicable in all other toxic tort cases, and, in the meantime, for the

California appellate courts to properly apply *Rutherford's* requirement that an asbestos plaintiff prove that exposure to defendant's product substantially contributed to his or her disease.

In the next installment of this series, to be published in the September 9, 2015 edition of this publication, we discuss the special way California courts have addressed design defect claims in asbestos litigation. In particular, we analyze the holding in *Arena v. Owens Corning Fiberglas Corp.*, 63 Cal. App. 4th 1178 (1998) that raw asbestos is a designed product and that it is defectively designed if the plaintiff's injury was caused by its intrinsically hazardous nature.

Endnotes

1. The text of the original August 28, 1997 decision and the modification order explaining the changes that were made to the three sentences in question is available on Westlaw by searching for "16 Cal. 4th 953." If the Pacific Reporter citation (941 P.2d 1203) is used to locate the *Rutherford* decision, Westlaw provides only the modified opinion, without any explanation of what portions of the opinion were modified. The same is true of the printed version in the California Reporter.

2. See, e.g., *Silvestro v. Kaiser Gypsum Co.*, 2009 Cal. App. Unpub. LEXIS 2910, *22 (Apr. 13, 2009). ("Silvestro cannot have it both ways. His case was largely dependent on his theory and evidence that even low level exposures of the least potent type of asbestos contribute to causing mesothelioma, and the jury accepted his theory and evidence in fixing liability on Kaiser Gypsum. So be it. But we decline to follow Silvestro's implicit suggestion on appeal that his evidence may be accepted for purposes of liability, but disregarded when it comes to allocating a measure of damages to individual manufacturers.") ■

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