ILLINOIS DEFENSE COUNSEL

SURVEY OF LAW 2020

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Survey of Toxic Tort Law Cases

Employers' Liability Insurer's Duty to Defend and Indemnify Not Triggered by Employee Asbestos Suit

The Illinois Appellate Court Fifth District affirmed the Circuit Court of Madison County's award of summary judgment to an insurer issuing employers' liability policies on the basis that underlying asbestos employee suit did not fall within coverage provisions.

Apex Oil was sued by a former employee of Apex from 1975 to 1996, alleging exposure to asbestos during the course of the former employee's work resulted in the former employee developing mesothelioma in 2008. Arrowood issued Apex various employers' liability insurance policies from 1966 to 1982. Apex argued that because it was an insured under the employers' liability policies, Arrowood had a duty to defend and indemnify Apex in the underlying suit. Arrowood denied Apex's tender. Apex filed suit to recover its defense costs and a confidential settlement of the underlying suit under section 155 of the Illinois Insurance Code (215 ILCS 5/155 (West 2012)) for Arrowood's vexatious and unreasonable refusal to defend or pay indemnity for the underlying employee suit. Arrowood filed a counterclaim seeking a declaratory judgment that it had no duty to defend or indemnify Apex. The trial court granted summary judgment in Arrowood's favor and Apex appealed.

Arrowood argued that based on the last day of exposure provision in the policy, coverage was precluded as the employee's last day of employment was in 1996. The last day of coverage issued by Arrowood was 1982. The Arrowood policies also contained a 36-month provision that precluded coverage for any written claim or suit against the insured for damages because of "bodily injury by disease" if suit was not made or brought within 36 months after the end of any Arrowood policy period. The underlying suit against Apex was not filed until 2010, 28 years after the last Arrowood policy expired in 1982. The court rejected the argument that the employee's mesothelioma should be considered a "bodily injury by accident" because the underlying complaint did not allege an accident resulting from an occurrence. Under the workers' compensation and occupational disease laws, an "accident" is traceable to a "definite time, place and cause." Therefore, the underlying complaint's allegations fell within the policy's "bodily injury by disease" limitations.

Apex Oil Co. v. Arrowood Indem. Co., 2020 IL App (5th) 180396-U.

Madison County Asbestos Trial Judge Denies Motion to Dismiss Based Upon *Forum Non Conveniens*

In *Ellerbrock v. A.O. Smith Corp.*, Madison County asbestos trial judge Steven Stobbs denied defendant PW Power Systems' motion to dismiss based on *forum non conveniens*. The plaintiff, Mary Ellerbrock, filed suit against numerous defendants on behalf of the estate of Alex Kaszynski alleging that the decedent was exposed to asbestos while working at a power plant owned by defendant PW Power Systems.

The defendant moved to dismiss the case and to transfer it from Madison County to LaSalle County, Illinois, arguing that LaSalle County was a more convenient forum because all of the named fact witnesses were located there, all of the alleged asbestos exposures occurred there, and a majority of the decedent's work history occurred in LaSalle County. The defendant also noted that most of the co-defendants in the case had raised the issue of *forum non conveniens* and that the plaintiff's choice of forum was entitled to less deference because it was not the location of the plaintiff's residence or the location of the injury.

In response, the plaintiff argued that her forum choice of Madison County was entitled to substantial deference. She also argued that the defendant did not meet its burden with respect to the private or public interest factors weighing in favor of dismissal. Specifically, the plaintiff claimed that only one fact witness was identified by the defendant and the defendant's expert witnesses were not located in LaSalle County. With respect to the public interest factors, the plaintiff claimed that asbestos cases in Madison County are handled expeditiously and that nothing was offered to support the argument that LaSalle County would handle the matter in a more efficient manner.

On a January 3, 2020, Judge Stobbs denied PW Power Systems' motion to dismiss. In ruling, the court noted that no other defendant joined in PW Power Systems' motion, and that the moving party is required to show that a plaintiff's forum is inconvenient to the moving party and that another forum is more convenient to all parties involved. The court went on to highlight the fact that PW Power Systems was the only defendant to appear at the hearing, and that if

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the court were to dismiss PW Power Systems, it would still have to try the case in Madison County against the remaining defendants. Such a result would not "unburden" Madison County from litigation that could be more conveniently tried in another forum. The court, therefore, concluded that PW Power Systems failed to meet its burden to show that the public and private interest factors overwhelmingly favored dismissal in favor of another forum.

Ellerbrock v. A.O. Smith Corp., No. 18-L-1434 (Cir. Ct. Madison Cnty. Jan. 9, 2020).

Grant of Summary Judgment in Favor of an Illinois Defendant Creates an Opportunity to Remove an Asbestos Case to Federal Court Based on Diversity Jurisdiction

In *Hicks v. Ford Motor Co.*, Ford Motor Co. moved to remove a case to federal court after an Illinois resident, John Crane, Inc. (Crane), was granted a summary disposition against the plaintiff. Crane moved for summary judgment based on lack of identification, and the plaintiff did not submit a response. The court entered an agreed order which stated "John Crane, Inc.'s Motion for Summary Judgment is hereby granted based on lack of product identification over Plaintiff's objection." (Doc. 12-20). Subsequently, Ford Motor Co., a Delaware company with its principal place of business in Michigan, filed a Notice of Removal and the plaintiff filed an immediate Motion for Remand, which was denied. (Doc. 1, 7). The United States District Court for the Central District of Illinois discussed a feasible theory under which the plaintiff could have prevailed but ruled it did not apply to this case. Therefore, the court denied the plaintiff's motion to remand.

First, the United States Senior District Judge Joe Billy McDade confirmed the dismissal of Crane was involuntary, as the granting of the motion was over the plaintiff's objection. (Doc. 12-20). The voluntary/involuntary rule generally bars a case from becoming removable where any non-diverse defendants are dismissed against a plaintiff's wishes; voluntarily dismissed non-diverse defendants, however, present no obstacle to removal. *Poulos v. Naas Foods, Inc*., 959 F.2d. 69, 71 (7th Cir. 1992). Second, the court noted where a defendant was dismissed against the plaintiff's wishes, the doctrine of "fraudulent joinder" nevertheless allows an out-of-state diverse defendant to access the federal courts where there exists a claim against an in-state defendant, but it simply has no chance of success. *Poulos*, 959 F.2d at 73. Under this complex doctrine, the court must essentially predict whether there ever would be an instance in which the dismissed defendant may be reinstated based on a theory brought by a plaintiff.

In *Hicks*, the plaintiff made two arguments for remand: (1) the allegations in the complaint were distinguishable from *Poulos*; and (2) allowing removal would essentially make fraudulent joinder present whenever a plaintiff loses a motion for summary judgment. (Doc. 7 at 10-11). Ford, by contrast, argued the plaintiff could not reinstate Crane because the plaintiff failed to oppose Crane's motion for summary judgment and therefore waived the right to an appeal. (Doc. 8 at 10-11). In support of its argument, Ford relied on *Chambers v. MW Custom Papers, LLC*, No. 19-cv-5363, a nearly identical case from the United States District Court for the Northern District of Illinois where the court held fraudulent joinder allowed for removal. (Doc. 7 at 8-1).

The district court ultimately sided with Ford and agreed *Chambers* applied. It was pivotal to the court's analysis that the plaintiff forfeited his right to an appeal by failing to oppose Crane's motion for summary judgment. Specifically, the court noted "the clear direction of the inquiry prescribed in *Poulos* is to determine whether a non-diverse defendant might yet return to the case." *Poulos*, 959 F.2d at 73. Accordingly, the facts of the case presented no scenario in which the plaintiff could have overcome the grant of summary judgment in favor of Crane and reinstate Crane because the plaintiff waived his right to an appeal by not responding to Crane's motion for summary judgment.

Hicks v. Ford Motor Co., No. 1:20-cv-1019, 2020 WL 902528 (C.D. Ill. Feb. 25, 2020).

No Third Bite at the Apple for Insured in Coverage Dispute Involving Underlying Asbestos Claims

After two exhaustion trials, the Illinois Appellate Court First District affirmed the Circuit Court of Cook County's determination of coverage limits, finding that the insured had not demonstrated its primary policies were exhausted, and properly denied the insured's motion for a new trial.

John Crane Inc. (Crane) was a manufacturer of asbestos-containing gaskets, mechanical seals, and packing products. As of 2017, Crane had been named in over 325,000 asbestos cases claiming exposure to these products. Crane had primary insurance coverage from Kemper as well as umbrella and excess coverage from the defendants. In 2004, Crane filed a claim for a declaratory judgment that Kemper's primary coverage was exhausted and

sought a declaration of the obligations of its umbrella and excess carriers. After an exhaustion trial was held, the trial court found that Crane did not prove that the primary policies were exhausted. Crane appealed, and the appellate court remanded the case for a second exhaustion trial.

During the second exhaustion trial, the parties stipulated the amount of the Kemper primary policies to be exhausted relying on Crane's expert to establish that the primary policies were exhausted. The trial court, however, found the expert's method of allocation problematic and that the expert did not always follow his own methodology. The trial court found Crane's expert committed error in determining the trigger dates of six claims. This error resulted in the expert's allocation no longer demonstrating that the primary policies were exhausted. Crane moved for a new trial, which the trial court denied. Because Crane relied on its expert's testimony to demonstrate exhaustion of the primary policies, the appellate court found the trial court, as the trier of fact, assessed the credibility of the expert and found the evidence did not prove exhaustion of the primary policies. Therefore, the appellate court refused to disturb the trial court's findings as it was not against the manifest weight of the evidence. The appellate court also found that the trial court's denial of Crane's motion for a new trial would not be reversed absent an abuse of discretion. Because the appellate court found that the trial court did not err in the rulings challenged by Crane, there was no basis on which to order a new trial.

John Crane Inc. v. Allianz Underwriters Ins. Co., 2020 IL App (1st) 180223.

Illinois Appellate Court Fourth District Reverses Circuit Court of McLean County in Asbestos Litigation on the Issue of Causation Evidence

In *Krumwiede v. Tremoco, Inc.*, the Illinois Appellate Court Fourth District determined that the plaintiffs failed to establish at trial that the decedent's work with the defendant's products was a substantial factor in the cause of the decedent's illness. In that case, the plaintiffs alleged that the decedent was exposed to asbestos, in part, through his work with Tremco caulk and tape, and that he developed mesothelioma as a result of asbestos exposure. The decedent worked as a window glazier from the mid-1950s to the early 1990s. At trial, two of the decedent's former co-workers testified that they and the decedent used Tremco caulk and glaze in their roles as glaziers. The witnesses, however, could not recall seeing dust emanate from the Tremco products or anything on the products' packaging indicating that they contained asbestos.

Plaintiffs' medical expert, Dr. Arthur Frank, testified that a person's cumulative dose of asbestos contributes to the development of mesothelioma. In elaborating on this opinion, Dr. Frank testified that there is no scientific way to determine what exposure to asbestos caused a person's illness, but rather, a person's total exposure is considered the cause of the illness. Dr. Michael Graham, a pathologist, testified for Tremco, opining that there were amosite asbestos fibers found in the decedent's lung tissue, but that those fibers had nothing to do with the decedent's work with Tremco products, as those products only contained chrysotile asbestos fibers. Dr. William Longo also testified for Tremco, explaining that he previously tested the Tremco products and found no detectable asbestos fibers, which was because the products were thermoplastic materials. Dr. Longo admitted, however, that he could not rule out that Tremco products released respirable asbestos fibers. Ultimately, the jury returned a verdict for the plaintiffs.

On appeal, the Fourth District concluded that the plaintiffs failed to establish that the decedent's work with Tremco products was a substantial factor in the cause of his mesothelioma. Under Illinois law, the plaintiffs were required to prove that the decedent was exposed to asbestos from Tremco's products with such frequency, regularity, and proximity that the asbestos from those products could be viewed as a substantial factor in causing the decedent's mesothelioma. According to the court, simply proving that the decedent worked in proximity to Tremco products did not satisfy this standard because it did not establish that the decedent had frequent, regular, and proximate contact with respirable asbestos fibers from the products.

The court believed that there was an absence of evidence explaining under what circumstances Tremco's products released respirable asbestos fibers that were inhaled by the decedent. Stated differently, just because Tremco's products were capable of releasing asbestos fibers did not mean they actually did so when the decedent worked with the products. The court also determined that the plaintiff failed to present evidence showing that Tremco's products released more than a *de minimis*, casual, or minimum amount of asbestos fibers when the decedent encountered the products. Illinois law does not require a plaintiff to quantify the number of asbestos fibers to which a decedent was exposed, but a plaintiff must show more than a *de minimis* exposure to the defendant's asbestos. Finally, while the court found that Dr. Frank's "cumulative exposure" testimony was admissible under Illinois law, the court concluded

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that his testimony did nothing to aid the plaintiffs in satisfying the substantial factor test under Illinois law because he did not opine that exposure from Tremco products was a substantial factor in bringing about the decedent's illness. Rather, Dr. Frank generically testified that the decedent's exposures to asbestos, without specifying exposures to asbestos from Tremco's products, caused him to develop mesothelioma. Ultimately, the court concluded that the trial court should have granted judgment *N.O.V.* to Tremco due to the plaintiffs' failure to present evidence showing that the decedent's exposure to respirable asbestos fibers from Tremco's products on a frequent, regular, and proximate basis was a cause in bringing about the decedent's mesothelioma.

Krumwiede v. Tremco, Inc., 2020 IL App (4th) 180434.

In Lead Poisoning Case, Personal Injury or Property Damage is Required to Recover Costs of Medical Care Covered Under Medicaid, and State's Right of Recoupment Against Wrongdoer Does Create Liability

Three plaintiffs in *Lewis v. Lead Industries Association*, filed a class action in Cook County, Illinois against four defendants, each of which was a former manufacturer of white lead pigments or the alleged corporate successor to such a manufacturer. The plaintiffs sought to recover costs of blood lead screenings, which their children underwent as required by the Lead Poisoning Prevention Act (Act) (410 ILCS 45/1 *et seq*. (West 2000)). The complaint specifically excluded any claim for recovery for physical injury to their children. Rather, their claims were solely one for economic injury to the parents for the costs of the lead screening.

The defendants filed a motion for summary judgment on the basis that none of the three plaintiffs incurred any expense, obligation, or liability for the lead toxicity testing of their children, as the testing costs were covered under Medicaid for two of the plaintiffs and there was no evidence to show that the third plaintiff or her insurer had paid anything for her child's screening. The circuit court granted defendants' motion for summary judgment finding that none of the three plaintiffs had an actual injury, and the plaintiffs appealed. The appellate court reversed the summary judgment order as to the two plaintiffs whose expenses were covered under Medicaid finding that, although the plaintiffs did not incur any costs, they nonetheless had a legally sufficient claim of injury because they incurred an obligation for the cost of the tests. The defendants appealed.

Reversing the judgment of the appellate court, the Illinois Supreme Court reiterated the common law that a plaintiff cannot sue in tort to recover for solely economic loss without any personal injury or property damage. "The wrongful or negligent act of the defendant, by itself, gives no right of action to anyone." Rather, a plaintiff can sustain a cause of action only where he or she has suffered an actual injury caused by the defendant's conduct. No cause of action accrues until the defendant's wrongful or negligent act produces injury to the plaintiff's interest by way of loss or damage. Accordingly, the court held that the plaintiffs were required to establish actual economic loss as an essential element of their claims. And further, because the plaintiffs never became indebted to the medical providers who conducted the screenings, they did not incur a legal obligation to pay for the screenings, and thus, an injury did not accrue. The state's right of recoupment for Medicaid payments also did not create an injury; this right is a claim against a *wrongdoer* and not against the Medicaid recipient. Furthermore, the court rejected the notion that the collateral source rule can be used to satisfy the injury element of the plaintiffs' cause of action when the plaintiffs have suffered no injury. "Preventing a plaintiff who has not been injured from recovering money does not confer a 'windfall' on the defendant. Nor does a defendant 'benefit' from avoiding compensating the plaintiff for a noninjury." The plaintiffs did not incur any liability and did not suffer any actual economic loss in this case. Accordingly, the court held that the circuit court properly granted summary judgment in favor of defendants and therefore, the judgment of the appellate court was reversed, and the cause was remanded to the Circuit Court of Cook County for further proceedings.

Lewis v. Lead Industries Ass'n, 2020 IL 124107.

Illinois Appellate Court Finds Tortious Act Within the State Not Required for Specific Jurisdiction in an Asbestos Case

In *Linder v. A.W. Chesterton Company,* the Illinois Appellate Court Fifth District upheld an order from the Circuit Court of Madison County denying a pump manufacturer's motion to dismiss for lack of personal jurisdiction. The plaintiffs, Joel and Linda Linder, filed a lawsuit in this case alleging that asbestos dust arising from pumps manufactured by defendant, GIW Industries, contributed to Joel Linder's development of mesothelioma.

The plaintiffs alleged that Mr. Linder was exposed to asbestos attributable to GIW Industries' pumps through his employment in Illinois. GIW Industries filed a motion to dismiss for lack of

personal jurisdiction. The arguments focused on whether the Illinois court could exercise specific personal jurisdiction over defendant GIW Industries. GIW Industries maintained that the circuit court lacked specific jurisdiction over the plaintiffs' claims because the pumps sold by GIW Industries to Mr. Linder's employer did not contain asbestos.

Through discovery, GIW Industries produced Bills of Materials for pumps sold to Mr. Linder's employer. GIW Industries' corporate representative testified that pumps sold to Mr. Linder's employer did not contain asbestos. The corporate representative explained that GIW Industries included a notation on its Bills of Materials when the pumps that it sold came with asbestos-containing packing. The corporate representative testified that pumps sold to Mr. Linder's employer lacked such designation and were, therefore, asbestos-free. GIW Industries argued that it did not commit a tortious act in the state of Illinois because the pumps sold to Mr. Linder's employer did not contain asbestos. GIW Industries further argued that it was not subject to specific jurisdiction in Illinois absent a tortious act in the state.

The court rejected GIW Industries' argument that the plaintiffs must prove that it committed a tortious act within the state of Illinois for the circuit court to exercise personal jurisdiction. The court held that GIW Industries' sale of pumps to Mr. Linder's employer in Illinois was sufficient for the court to exercise specific personal jurisdiction over GIW Industries. GIW Industries admitted that it purposefully sold pumps to Illinois that were the subject of the plaintiffs' claims.

The Illinois Constitution and United States Constitution require that a defendant purposefully direct its activities at the forum state and that the cause of action arose out of or relates to the defendant's contacts with the forum state. Affirming the trial court's order denying GIW Industries' motion to dismiss for lack of personal jurisdiction, the court held that the constitutional standard was met by GIW Industries' sale of products to Illinois that were the subject of the plaintiffs' claims.

The court also addressed the plaintiffs' argument that the circuit court erred in granting GIW Industries' motion for protective order to prohibit the dissemination and use of the Bills of Material regarding sale of pumps outside of the present litigation. The plaintiffs argued that the Bills of Materials could not be the subject of a protective order because the documents were not confidential. The court rejected the plaintiffs' argument that materials must be confidential to be the subject of a protective order. Illinois Supreme Court Rule 201(c) grants trial courts considerable discretion in determining whether protective orders are appropriate. Citing to S*kolnick v. Altheimer & Gray*, 191 Ill. 2d 214, 221 (2000), the court stated that it would only alter the terms of the protective order if no reasonable person could adopt the position taken by the lower court.

Linder v. A.W. Chesterton Co., 2020 IL App (5th) 200101.

Illinois Appellate Court Second District Rules in Favor of County Health Department in Dispute Regarding COVID-19 Patient Information

In *McHenry County Sheriff v. McHenry County Department of Health*, the Illinois Appellate Court Second District reversed a McHenry County trial court's order finding that the trial court abused its discretion in denying the McHenry County Health Department's motion to dissolve a temporary restraining order which required it to provide the names and addresses of individuals who tested positive for COVID-19.

In April 2020, the McHenry County Sherriff's Department and four local municipalities sought information regarding the names of those infected with COVID-19 to provide to responding officers. The information was to be provided to the McHenry County Emergency Telephone System Board so that individual police officers could be notified when they were encountering an infected person, thereby allowing the individual officers to take "adequate precautions" to minimize the risk of infection. The McHenry County Department of Health (Health Department) opposed the information request. The Health Department argued that the information sought was protected health information under the Health Insurance Portability and Accountability Act of 1996 (HIPAA); the information sought was ineffective for the purpose of protecting individual police officers because of deficiencies in testing for infections; the estimated infection count was believed to be some 10 times greater than the reported confirmed infections, and the worry that the illness could be spread through asymptomatic infected persons.

On April 10, 2020, the trial court granted the Sheriff's Department's emergency motion for a temporary restraining order (TRO). The trial court determined that the Sheriff's Department had demonstrated "a certain and clearly ascertainable right needing protection" due to the health risks associated with COVID-19 and to assist police officers in the performance of their duties to the best of their ability. Following the ruling, the Health Department filed a motion to reconsider and to dissolve the temporary restraining order. On June 16, 2020, the trial court denied the motion to reconsider and

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motion to dissolve. The Health Department filed an interlocutory appeal the following day.

On appeal, the Second District found in favor of the Health Department and dissolved the temporary restraining order compelling it to provide the names and address of COVID-19 positive individuals. As an initial matter, the appellate court found that it could not address the issuance of the TRO given the Health Department's failure to timely appeal that ruling. However, because the motion to dissolve was filed and denied by the lower, court, the Second District could address the issue under Illinois Supreme Court Rule 307(d)(1). The court found it was undisputed the information fell within an exception to HIPAA that permitted, but did not require, a local health department to release protected health information. The court determined where discretion to provide the information sought exists, the party seeking the information cannot claim a right to that information. Further, because there was no right to the information sought, the Sheriff's Department could not demonstrate the existence of a fair question regarding the right sought. An essential element to obtaining a TRO is to demonstrate the existence of a fair question as to whether it has a right to the relief requested. As such, the Second District concluded that the trial court abused its discretion in denying the motion to dissolve the TRO.

McHenry County Sheriff v. McHenry County Dep't of Health, 2020 IL App (2d) 200339.

Illinois Circuit Court Reverses Prior Ruling on the Issue of Personal Jurisdiction In Asbestos Lawsuit

In *Riebel v. 3M Co.*, defendant, United States Steel Corporation (U.S. Steel), a Delaware corporation headquartered in Pittsburgh, operated a steel mill in Gary, Indiana. The plaintiff's decedent, Fred Riebel, was a resident of Illinois, and a member of the International Heat & Frost Insulator's Union, Local 17. The decedent was hired by an Illinois insulation contractor to work at U.S. Steel's Gary Works in 1994 and again in 1995. The decedent also worked at numerous industrial sites in Illinois. He died from mesothelioma, an asbestos-related disease, and the plaintiff brought premises liability claims against multiple defendants for wrongful death, including against U.S. Steel for its Indiana plant.

U.S. Steel brought a motion to dismiss for lack of personal jurisdiction, arguing that there was no general jurisdiction over a Delaware corporation headquartered in Pennsylvania, and no specific jurisdiction because the alleged tortious conduct (asbestos exposure) occurred in Indiana, not Illinois. In response, the plaintiff asserted the Circuit Court of Cook County, Illinois had specific personal jurisdiction over U.S. Steel, on the basis that (1) U.S. Steel had the requisite minimum contacts with Illinois because U.S. Steel "purposefully directed its activities toward Illinois" and this suit arose directly from or was connected to U.S. Steel's conduct in Illinois; and (2) it was reasonable to require U.S. Steel to litigate this matter in the state of Illinois. Although not alleged in her complaint, the plaintiff also claimed that the decedent "carried home asbestos fibers" to Illinois on his return from work in Indiana.

In reply, U.S. Steel argued that: (1) the location of the decedent's employer was not a purposeful factor in U.S. Steel's selection of a contractor, nor was the residence of the contractor's employees afforded any weight or consideration by U.S. Steel in soliciting bids for its contracting activity; and (2) there was insufficient evidence to establish the plaintiff's newly-raised allegation that the decedent was somehow exposed to asbestos from U.S. Steel's Gary Works facility within the state of Illinois (*i.e.*, in the form of "take home" exposure to asbestos).

Judge Clare McWilliams initially granted U.S. Steel's motion on November 26, 2019. The court agreed with U.S. Steel that the United States Supreme Court case *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S.Ct. 1773, 1781 (2017) stood for the well-settled rule that a plaintiff's cause of action must arise directly out of a defendant's contacts with the forum for a state court to exercise specific personal jurisdiction over an out-of-state defendant. The court disagreed with the plaintiff's contention that U.S. Steel's "contractual contacts" with decedent's Illinois employer were the "but-for" cause of the decedent's employment "which directly gave rise to the decedent's presence at the U.S. Steel Gary Works facility in Gary, Indiana, and caused his regular and frequent exposure to asbestos."

On the contrary, the court found that notions of due process require "that defendants be hailed into court in a forum State based on their own affiliation with the State, not based on the 'random, fortuitous, or attenuated' contacts they make by interacting with other persons affiliated with the State." Additionally, the court stated that the plaintiff's observation of the decedent returning from work to their residence in Illinois with *dust and dirt* on his person from various job sites did not establish that the decedent was exposed to asbestos in Illinois, particularly from U.S. Steel.

In her November 26, 2019 Memorandum and Opinion, Judge McWilliams additionally found it would be unreasonable to litigate this case within the state of Illinois, because litigation in this

state would offend "traditional·notions of fair play and substantial justice" (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310,316 (1945)), and that the "circumstances surrounding this matter were far too attenuated and speculative to establish a connection between U.S. Steel's allegedly tortious conduct in the operation of its Gary Works facility and U.S. Steel's purposeful affiliations with this State."

On a motion to reconsider, the court reversed course and denied U.S. Steel's motion on January 29, 2020. Contrary to its initial ruling, the court applied a "but-for" analysis and ruled that because U.S. Steel contracted with an Illinois employer of the plaintiff, the court had jurisdiction over an Indiana premises owner.

The plaintiff again argued that U.S. Steel possessed the requisite minimum contacts with this state by entering into a contractual relationship with the decedent's Illinois employer at the time the decedent would have worked as an insulator at U.S. Steel's Gary Works facility in Indiana. This time around, the court stated that it had misapplied the *Bristol-Myers* decision and found it had jurisdiction on the basis that U.S. Steel's "minimum contacts" with the state of Illinois (*i.e.*, U.S. Steel's contractual agreements with the decedent's Illinois employer ultimately gave rise to the decedent's exposure to asbestos and asbestos-containing materials at U.S. Steel's Gary Works facility in the state of Indiana, the underlying cause of action in this matter).

This decision appears to readopt the same "sliding scale" approach to specific personal jurisdiction that the United States Supreme Court rejected in *Bristol-Myers* as violative of a defendant's due process rights. Allowing personal jurisdiction in a tort action based upon a contractual connection to an unrelated party seems to stretch the interpretation of the recent string of Supreme Court decisions on the issue of personal jurisdiction. It will be interesting to see how the Illinois Supreme Court weighs in on this issue.

Riebel v. 3M Co., No. 15-L-2124 (Cir. Ct. Cook Cnty. Nov. 26, 2019).

Illinois Supreme Court Finds No Personal Jurisdiction Over Claims of Out-of-State Plaintiffs

In *Rios v. Bayer Corp*., the Illinois Supreme Court held that Illinois courts lacked personal jurisdiction over claims against an out-of-state defendant as to claims of out-of-state plaintiffs for personal injuries suffered outside of Illinois from a device manufactured outside of Illinois.

The plaintiffs alleged personal injuries from the use of Essure, a permanent birth control device for women. In two separate cases filed in 2016, 179 plaintiffs from numerous states brought claims against various Bayer entities incorporated and located outside of Illinois. Less than one year after plaintiffs filed their complaints, the United States Supreme Court issued its decision in *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773 (2017), holding that California did not have personal jurisdiction over a nonresident defendant when the conduct giving rise to the claims did not occur in the forum state. Bayer moved to dismiss as to the nonresident plaintiffs for lack of specific jurisdiction under *Bristol-Myers*. The Madison County Circuit Court denied Bayer's motion to dismiss and the Illinois Appellate Court Fifth District affirmed. The Illinois Supreme Court granted leave to appeal.

Relying on *Bristol-Myers*, the Illinois Supreme Court held that while Bayer had conducted clinical trials in Illinois, held physician training programs for Essure in Illinois, and coordinated a marketing strategy in Illinois, the nonresident plaintiffs' claims did not arise out of, or relate to those activities in any meaningful sense of the terms. First, the court found that plaintiffs failed to assert that Essure devices were manufactured in Illinois or that Bayer established manufacturing procedures in Illinois. Therefore, there was not an adequate link between the nonresident plaintiffs' manufacturing defect claims and the forum. Second, the court also found that plaintiffs failed to allege that either they or their physicians received false information in Illinois, as the plaintiffs and their physicians resided outside of the forum and the devices were implanted outside the forum. Therefore, there was nothing linking Bayer's alleged failure to warn to any activities that occurred in Illinois. Finally, the court found that plaintiffs failed to allege Bayer breached a duty to properly train physicians, as there were no allegations the physicians were trained in Illinois. Having identified no jurisdictionally relevant links between plaintiffs' claims and Illinois, the court held that Illinois lacked specific personal jurisdiction over the plaintiffs' claims.

The Illinois Supreme Court further held that it would not be reasonable for the nonresidents' claims to proceed in Illinois. In assessing reasonableness, courts consider (1) the burden on defendant, (2) the forum state's interest in adjudicating the dispute, (3) the plaintiff's interest in obtaining convenient and effective relief, and (4) the judicial system's interest in obtaining the most efficient resolution of the controversy." *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 291-92 (1980). The court found these factors weighed strongly against Illinois courts exercising specific personal jurisdiction because Illinois has no interest in resolving claims that do not

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arise out of or relate to activities occurring in the forum and this is not outweighed by non-Illinois plaintiffs' interest in obtaining relief. In addition, the nonresidents failed to explain how Illinois could be a convenient location when they were implanted with their devices outside of the forum and had identified no other activity connecting their specific claims to Illinois. Further, many nonresident plaintiffs initiated duplicate actions in California, which demonstrated that the interests of judicial economy would not be furthered by permitting their claims to proceed in Illinois.

The Illinois Supreme Court concluded that the nonresident plaintiffs' claims did not arise out of or relate to defendants' in-state activities and thus, Illinois courts lacked specific personal jurisdiction over Bayer. Accordingly, the court reversed the judgments of the appellate and circuit courts and remanded the actions to the trial courts for entry of orders granting Bayer's motions to dismiss for lack of personal jurisdiction.

Rios v. Bayer Corp., 2020 IL 125020.

Illinois Appellate Court Fifth District Finds that a Decedent's Estate is Not Time-Barred From Filing Benzene Lawsuit Despite Decedent's Prior Benzene Lawsuit and Workers' Compensation Claim

In the unpublished opinion *Stamper v. Turtle Wax, Inc.*, the Illinois Appellate Court Fifth District reversed the granting of a section 2-619 motion to dismiss by the Circuit Court of Madison County, based on the expiration of the statute of limitations under section 13-202 of the Code of Civil Procedure. The plaintiff was special administrator to the estate of her late husband, who had worked for the Village of Roxana as a firefighter and repairman on street and sewer lines. The decedent was diagnosed with glioblastoma multiforme (GBM), a type of brain cancer, in August 2010 and died on January 31, 2014.

In July 2011, the decedent filed an application for adjustment of claim with the Illinois Workers' Compensation Commission, claiming that his cancer was caused by benzene exposure he experienced while working for the Village of Roxana. However, the claim was withdrawn by the plaintiff after the decedent's death. In November 2013, the decedent joined a lawsuit against past and present owners of a refinery in Roxana, alleging they had negligently polluted ground water in areas where he resided and worked.

In October 2017, the plaintiff filed the underlying action against multiple defendants alleging the wrongful death of the decedent from exposure to benzene. The defendants filed motions to dismiss, arguing the expiration of the two-year statute of limitations because the decedent knew or should have known benzene exposure caused his injury when he alleged benzene exposure in filing his application for adjustment of his workers' compensation claim in 2011 and when he joined the prior benzene exposure lawsuit in Madison County. The trial court granted the motion to dismiss, finding it "pretty obvious" that the decedent knew or should have known of benzene causing his injury when he signed his name to his application for adjustment of his worker's compensation claim. Thereafter, plaintiff filed a motion to vacate the dismissal, asserting that the decedent's signed application for adjustment of his workers' compensation claim was not considered a binding judicial admission. The trial court denied the plaintiff's motion to vacate and the plaintiff appealed.

On appeal, the plaintiff argued the trial court should be reversed for granting the motion to dismiss based solely on the decedent's 2011 workers' compensation claim. The plaintiff argued that the decedent filed his claim only with suspicion, which did not rise to actual knowledge, that the GBM was wrongfully caused, as evident by a lack of medical records indicating causation at that time. According to the plaintiff, the statute of limitation actually accrued in October 2016 when she read medical articles that benzene exposure could be a cause of GBM.

In accepting the plaintiff's argument and reversing the trial court, the Fifth District found the trial court did not consider the factual circumstances surrounding the decedent's prior actions and should not have considered the decedent's signature on the workers' compensation filing as "definitive proof" of the decedent having known, or that he should have known, that his injury was wrongfully caused by another's actions. The Fifth District further found that there were factual issues regarding whether the decedent knew his GBM was caused by benzene exposure, even though he made two prior filings alleging such. The plaintiff had offered affidavits indicating that: (1) the workers' compensation claim was withdrawn because an expert would not confirm the decedent's GBM was caused by benzene, and (2) despite diligent attempts by the decedent, his treating medical providers could not provide a definitive or specific cause of his GBM. According to the Fifth District, the defendants did not sufficiently rebut these claims with contradictory factual evidence, and the filing of the prior claims alleging benzene exposure were insufficient *per se* because the decedent could have filed the prior claims with a mere suspicion that his cancer was caused by benzene exposure.

The defendants made a *res judicata* argument based on a recent settlement of the action filed in Madison County in 2013, which the Fifth District declined to consider because such settlement did not occur until after the arguments were heard on the motion to dismiss.

Moreover, even though the defendants included a dismissal order from the 2013 action in the record, they did not include an underlying settlement and release.

Stamper v. Turtle Wax, Inc., 2020 IL App (5th) 180514-U.

Southern District Remands Asbestos Case for Lack of Complete Diversity

In *Wieland v. Arvinmeritor*, plaintiffs, Arlan Wieland and Dina Wieland, alleged that Arlan Weiland sustained injuries arising from exposure to asbestos-containing products attributable to defendant, Arvinmeritor, and other defendants. Arvinmeritor removed the case from the Circuit Court of Madison County to the United States District Court, Southern District of Illinois, on the basis of diversity jurisdiction pursuant to 28 U.S.C. § 1332. The plaintiffs filed a motion to remand the case to the Circuit Court of Madison County.

Removal to federal court is appropriate if the federal court has original jurisdiction pursuant to 28 U.S.C. § 1441. Citing *Howell v. Tribune Entertainment*, 106 F.3d 215, 217 (7th Cir. 1997), the court held that civil "[c]ourts have original jurisdiction . . . if there is complete diversity between the parties and the amount in controversy exceeds $75,000." To meet the requirements for complete diversity, "none of the parties on either side of the litigation may be the citizen of the state of which a party on the other side is a citizen." *Howell*, 106 F.3d at 217.

Arvirmeritor maintained that two, diverse defendants remained in the case. Those defendants were both incorporated in Delaware. The Weilands argued that a third defendant remained in the case. After a review of the court record, the district court determined that a third, non-diverse defendant that was not identified by Arvinmeritor was still listed as an active defendant in the case. The presence of diversity is determined by the jurisdictional circumstances at the time of removal. Thus, the district court found that Arvinmeritor had not met its burden of establishing complete diversity.

Ultimately, the district court held that it lacked subject matter jurisdiction over the plaintiffs' claims and remanded the case to the Third Judicial Circuit, Madison County, Illinois.

Wieland v. Arvinmeritor Inc., No. 20-CV-196-SMY, 2020 WL 833047 (S.D. Ill. Feb. 20, 2020).

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