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Survey of Toxic Tort Law Cases

Allegations that the City of Chicago's Actions in Replacing Water Mains and Meters Created Increased Risk of Lead Exposure Fails to Allege Cognizable Injury

In *Berry v. City of Chicago,* the Illinois Supreme Court reversed the Illinois Appellate Court First District and reinstated the trial court's dismissal of the class action holding that an increased risk of future harm is not a compensable injury. The Illinois Supreme Court further held that "dangerousness" is not objectively measurable, therefore, "dangerousness alone cannot constitute damage under the Illinois takings clause.

Plaintiffs filed suit in the Circuit Court of Cook County alleging increased lead in their drinking water due to construction performed by the City of Chicago. Until 2008, 80 percent of the residential water lines in Chicago were made of lead. Although the City of Chicago chemically treated these lines to prevent corrosion, the protective coating can become compromised from construction, or by a sudden rush of water after a line is turned back on after a period of inactivity. If the protective coating is compromised, then it can result in lead in the drinking water.

Plaintiffs' class action complaint centered on allegations that the City of Chicago was negligent in their replacement of water mains and meters that supplied water to its residents, and a legal theory of inverse condemnation due to the city making residents' water lines more dangerous. The City responded by moving to dismiss the complaint for (i) failure to state a claim, and (ii) the City's immunity under the Local Governmental and Governmental Employees Tort Immunity Act. The trial court dismissed the case. The appellate court reversed and remanded.

The supreme court agreed with the City that an increased risk of future harm alone is not an injury. The supreme court also held that the need for medical monitoring due to increased risk of lead exposure is not an injury because the need for medical monitoring would be based on the potential increased risk of harm, which is not an injury.

Further, the supreme court quoted language from its earlier precedent which stated:

> the injury amounts only to an inconvenience or discomfort to the occupants of the property but does not affect the value of the property, it is not within the provision of the constitution even though a personal action would lie therefor. The injury complained of must also be actual, susceptible of proof and capable of being approximately measured, and must not be speculative, remote, prospective or contingent.

Finally, the court noted that the plaintiffs did not allege any depreciation to their property value, which is required.

Berry v. City of Chicago, 2020 IL 124999.

Timeliness of Removal of Asbestos Case Not Met under the "Federal Officer" Jurisdiction Requiring Reasonable Certainty of Federal Jurisdiction Rather than an Absolute Certainty

The United States District Court for the Southern District of Illinois has further clarified the standard that defendants must meet in order to survive a motion to remand pursuant to 28 U.S.C. § 1447. In *Murphy v. Air & Liquid Systems, Inc.*, the Southern District Court found that the 30-day removal deadline set forth in 28 U.S.C. § 1446(b)(1) is not triggered when a defendant is able to determine that a plaintiff's liability claims against it are based on exposure to the defendant's specific products. In *Murphy*, the plaintiff filed his complaint on February 2, 2021 in St. Clair County, Illinois, against several defendants including Westinghouse. Plaintiff asserted that he served in the U.S. Navy as a machinist mate from 1965 to 1968. During his naval service, the plaintiff was allegedly exposed to and inhaled asbestos fibers emanating from products manufactured, sold, distributed, or installed by the defendants. Westinghouse removed the case on May 28, 2021.

Prior to Westinghouse's removal, the plaintiff served written discovery responses confirming that his allegations of asbestos exposure were limited to his service in the U.S. Navy. The plaintiff described his duties as a machinist mate in the U.S. Navy and

described the alleged asbestos-containing products that he worked with and around. The plaintiff gave his discovery deposition on April 28, 2021 and identified the brands and manufacturers of the alleged asbestos-containing products he worked with during his service in the U.S. Navy. The plaintiff moved to remand his case back to state court based on the fact that Westinghouse failed to file its notice of removal within 30 days of being served with the plaintiff's complaint. In response, Westinghouse stated that, based on a reading of plaintiff's complaint and discovery responses, it could not determine whether the plaintiff was asserting liability based on the plaintiff's exposure to Westinghouse's specific products. Rather, Westinghouse did not learn of the *plaintiff's specific allegations relating to Westinghouse's products until the plaintiff's deposition.*

The court disagreed with Westinghouse. In order to remove a case based on "federal officer" jurisdiction, the removal statute requires "a defendant to have a 'reasonable certainty of federal jurisdiction, not an absolute certainty.'" (citing *Fields v. Jay Henges Enters., Inc.* The 30-day removal period set forth in 28 U.S.C. § 1447 is triggered when removal became ascertainable, not when it becomes uncontestable. *(*citing *Addison v. CBS Corp.* "A defendant cannot ignore facts that are readily known to it, such as the brands they control and the items they manufacture." Thus, Westinghouse did not need any further information outside of the plaintiff's complaint and written discovery responses to ascertain whether the plaintiff's claims against Westinghouse were removable.

Murphy v. Air & Liquid Sys., Inc., No. 21-cv-519, 2021 WL 4169986 (S.D. Ill. Aug. 3, 2021).

Ceramics Product Manufacturer Not Liable for Asbestos Contaminated Vermiculite Packing Material

In *Johnson v. Edward Orton, Jr. Ceramic Foundation*, the defendant Edward Orton, Jr. Ceramic Foundation (Orton) prevailed on a motion for summary judgment in an asbestos product liability lawsuit. Plaintiff, Deborah Johnson, alleged that her decedent husband, Bruce Johnson, developed cancerous mesothelioma from his exposure to asbestos in products sold by Orton, and others, in his work with ceramics. While still living, decedent filed a civil action in state court, and Orton removed the lawsuit to the United States District Court for the Northern District of Illinois after decedent settled with the last non-diverse defendant.

The decedent worked with ceramics from 1971 to 1984 in various schools and companies and utilized Orton pyrometric cones during that work. Orton manufactured pyrometric cones which were placed into kilns to measure temperature and indicate when the kilns were ready for firing. Orton cones did not contain asbestos. Orton packaged its cones in cardboard boxes and used the mineral vermiculite as a packing material. Orton did not manufacture or mine the vermiculite, and instead, Orton sourced vermiculite from two other companies who were not defendants in the lawsuit. Orton obtained vermiculite from W.R. Grace between 1963-75 and 1979-81, and from J. P. Austin from 1975-79 and 1982-83. The lawsuit alleged that W.R. Grace vermiculite, mined in Libby, Montana, contained small amounts (less than .1% by weight) of asbestos.

The plaintiff alleged that Orton was negligent for failing to warn decedent regarding the risk or hazards of asbestos with use of its product. After noting the traditional elements of a tort action, the court indicated the first step in its analysis was evaluating whether Orton owed decedent a duty. "In the product liability context, a manufacturer has a duty to warn potential customers when 'the product possesses dangerous propensities and there is unequal knowledge with respect to the risk of harm, and the manufacturer, possessed of such knowledge, knows or should know that harm may occur absent a warning.'"

The court determined that it was the second element, Orton's knowledge of the danger, that was at issue in the case. Noting that the knowledge analysis is an objective one that relies on industry knowledge at the time, the court ultimately determined that the plaintiff failed to establish that Orton knew, or should have known, that W.R. Grace was supplying vermiculite from Libby, Montana, or that Libby vermiculite was contaminated with asbestos. The only knowledge that Orton appeared to possess prior to 1981 (the year in which it stopped using vermiculite) was that W.R. Grace had Libby as one of its two sources of vermiculite. There was no evidence presented that Orton knew, or should have known, that the vermiculite it obtained from W.R. Grace's facility in Wilder, Kentucky, came from Libby. Moreover, the court determined that there was no evidence that ceramics manufacturers like Orton knew or should have known that W.R. Grace's vermiculite was sourced from Libby, Montana, or that Libby vermiculite contained asbestos. Accordingly, summary judgment was appropriate.

Finally, the court addressed plaintiff's contention that Orton should have been held to a higher standard of knowledge as a

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manufacturer as manufacturers are held to a degree of knowledge and skill of experts. The plaintiff argued that Orton should have been an "expert" in vermiculite. Orton countered that it manufactured the pyrometric cones and not the vermiculite used as a filler in its boxes. The court agreed noting the distinction between a seller and a manufacturer contained with the Restatement (Second) of Torts § 402 which allows a seller to assume goods from a "reputable" source are safe for use.

Because there was no evidence that Orton knew or shouldhave known of the risk present in the vermiculite, there was no issue of fact that would allow a jury to determine that Orton was negligent in failing to provide a warning and summary judgment was appropriate.

Johnson v. Edward Orton, Jr. Ceramic Found., No. 19-cv-06937, 2021 WL 2633308 (N.D. Ill. June 25, 2021).

Out-of-State Defendant Manufacturer Subject to Specific Personal Jurisdiction in Illinois When Injury Occurred in Illinois and Defendant had a Long History of Sales and Distribution in Illinois

In *Levy v. Gold Medal Products Co.*, the Illinois Appellate Court First District recently held that Illinois could exercise specific personal jurisdiction over a non-resident defendant manufacturer pursuant to the Illinois long-arm statute. 735 ILCS 5/2-209 (West 2016). Levy filed a complaint alleging strict liability and negligence against Gold Medal Products Co. and Ventura Foods, LLC, among other defendants, seeking recovery for lung injuries allegedly resulting from her exposure to diacetyl and acetyl propionyl—chemicals used for butter flavoring in popcorn. Levy claimed that she worked with these chemicals sold and distributed by defendants while she was employed by Long Grove Popcorn Shoppe, Inc. in Illinois.

Gold Medal did not argue that there was general jurisdiction over Ventura, so the appellate court only addressed whether the circuit court had specific jurisdiction over Ventura. A court is required to find that the nonresident defendant has "purposefully directed its activities at the forum state and the cause of action arose out of or relates to the defendant's contacts with the forum state" to establish specific jurisdiction over a nonresident defendant. (quoting *Russell v. SNFA*, (citing *Burger King Corp. v. Rudzewicz*,)).

The appellate court compared the *Levy* facts to *Russell*, holding that the circuit court could exercise specific personal jurisdiction

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over Ventura with respect to Gold Medal's claims for contribution under the Joint Tortfeasor Contribution Act. The court reasoned that the circuit court "can assert personal jurisdiction over Ventura as long as it is involved in 'the regular and anticipated flow of products from manufacture to distribution to retail sale' and is 'aware that the final product is being marketed in" Illinois. (citing *Asahi Metal Indus. Co. v. Sup. Ct. of Cal., Solano Cnty*. In *Levy*, the appellate court found that Ventura regularly manufactured products for Gold Medal that were subsequently distributed and sold in Illinois. Further, the appellate court held that Ventura was aware that Gold Medal products containing Ventura's chemical products were being marketed in Illinois.

The appellate court distinguished Ventura from a manufacturer whose injury-causing product is taken to another state by a customer's unilateral actions. The appellate court was not convinced by Ventura's claim that it was unaware that Gold Medal sold popcorn to Illinois and construed the conflict in facts in favor of Gold Medal. Gold Medal's representatives contradicted this claim, and Gold Medal's web site and product catalogs listed two branches in Illinois. Ventura sold 200,000 to 400,000 pounds of popcorn per year to Gold Medal for at least 25 years with the knowledge that those products would be sold nationwide.

In holding that this specific set of facts rendered Ventura amenable to Gold Medal's claims against it in the circuit court, the appellate court stated that "Ventura has thus done more than simply place its popcorn products into the nationwide stream of commerce; it has also engaged in conduct purposefully directed at Illinois regarding those products, which is all that is required under the narrow stream of commerce theory to allow the circuit court to

assert specific personal jurisdiction" over Ventura as to Gold Medal's action for contribution. The appellate court further concluded that Gold Medal's third-party claims against Ventura "arose out of or was related to Ventura's contacts with Illinois." In addition to Ventura's 25-year or more history of selling popcorn products to Gold Medal for nationwide distribution, Levy was injured after Gold Medal resold products to Levy's employer in Illinois.

Levy v. Gold Medal Prods. Co., 2020 IL App (1st) 192264.

Madison County Asbestos Trial Judge Issues Order Denying Motion to Dismiss Under Exclusive Remedy of the Illinois Workers' Compensation Act and Workers' Occupational Disease Act

In *Patton vs. McNulty Brothers Company*, the Circuit Court of Madison County asbestos trial judge Steven Stobbs denied defendant McNulty Brothers Company's motion to dismiss based on the exclusivity remedy provisions of the Illinois Workers' Compensation Act and Workers' Occupational Disease Act. Defendant argued that those laws were unconstitutionally amended with the additions of 820 ILCS 305/1.2 and 820 ILCS 310/1.1, and that they were the exclusive remedies for asbestos claims made against an employer.

The plaintiff, John Patton, filed suit against numerous defendants based on his development of mesothelioma. Plaintiff alleged that he was exposed to asbestos while employed by McNulty Brothers from 1969-1973 as a union carpenter at projects in Chicago, Illinois.

The defendant moved to dismiss the case claiming the Workers' Compensation Act and the Workers' Occupational Diseases Act are the exclusive remedies for an employee against his employer for alleged asbestos-related injuries received in the course of his employment. Therefore, any action against the defendant should have been brought through the Workers' Compensation Act. The defendant argued that the Workers' Compensation Act and Workers' Occupational Diseases Act were both in place when the plaintiff was employed by the defendant, and that the Illinois Supreme Court consistently ruled in favor of the exclusive remedy provision citing the decision in *Folta v. Ferro Engineering*, 2015 IL 118070 (2015). Further, the defendant argued that the 2019 amendments were unconstitutional because the expiration period for a cause of action against it had expired and that the legislation deprived it of due process provisions under the Illinois Constitution. Additionally, the defendant also moved to dismiss under the applicable statute of repose arguing that the plaintiff's claims were time barred because they were not brought within 25 years or by 2008. Thus, according to the defendant, the legislature essentially revived a time barred claim after the expiration of the statue of repose which violated due process.

The plaintiff filed a response in opposition arguing that his claims accrued following the amendments to the applicable statutes and that the defendant failed to demonstrate that its due process rights were violated. Specifically, the plaintiff argued that his diagnosis of mesothelioma in September 2019 was his date of injury, which occurred following the statutory amendments in May 2019. Thus, the amendments to the Workers' Compensation Act and the Workers' Occupational Diseases Act applied to hisclaims. Further, the defendant's due process rights were not violated because the defendant, as an employer, had no vested right to the exclusive remedy provisions. The plaintiff claimed that the legislature previously amended the Workers' Compensation Act and shifted the rights of workers and employers. The defendant allegedly failed to cite any authority that the legislature is constrained from amending the scope of exclusivity based on a constitutional limitation.

Following oral arguments on June 3, 2020, Judge Stobbs denied the defendant's motion to dismiss.

Patton v. McNulty Bros. Co., No. 2019L001460 (Cir Ct. Madison Cnty. Ill. Date).

Motion to Dismiss for Lack of Personal Jurisdiction Denied for an Ohio Defendant Sued by a Michigan Plaintiff for Michigan Asbestos Exposure

In *Roger Doane v. A.W. Chesterton Company*, a Cook County Circuit Judge denied defendant Cincinnati Incorporated's motion to dismiss for lack of personal jurisdiction in an asbestos exposure case. The Michigan plaintiff was employed as a machine operator at Steelcase in Grand Rapids, Michigan, for 37 years from 1965 to 2002. The plaintiff alleged that he developed mesothelioma due to exposure to asbestos brake components contained in Cincinnati's mechanical presses. All of the plaintiff's alleged asbestos exposure to Cincinnati products occurred in Grand Rapids, Michigan. Cincinnati was incorporated in Ohio, with its principal place of business in Ohio.

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In his response to Cincinnati's motion, the plaintiff did not contest the lack of general personal jurisdiction. However, he maintained that there were two bases on which the court should find that Cincinnati was subject to specific personal jurisdiction. First, the asbestos brake components in the Cincinnati mechanical presses were manufactured by Gatke Corporation located in Illinois. Second, Cincinnati had two facilities in Illinois. In support of his first basis, the plaintiff provided historical documentation to show generally that Gatke was an Illinois manufacturer of asbestos brake components. The plaintiff then cited to internal reports produced by Cincinnati concerning environmental brake testing conducted in the 1980's, in which Gatke asbestos brakes were prominently mentioned. The plaintiff asserted that because Gatke was an Illinois supplier of asbestos brake components, and because the Cincinnati testing reports almost exclusively referred to Gatke brakes, Gatke was most likely the exclusive supplier of brakes to Cincinnati manufactured in Illinois. Therefore, the plaintiff asserted that he must have been exposed to asbestos brake components manufactured by Gatke in Illinois, thereby conferring specific Illinois jurisdiction.

The plaintiff asserted that because Gatke was an Illinois supplier of asbestos brake components, and because the Cincinnati testing reports almost exclusively referred to Gatke brakes, Gatke was most likely the exclusive supplier of brakes to Cincinnati manufactured in Illinois. Therefore, the plaintiff asserted that he must have been exposed to asbestos brake components manufactured by Gatke in Illinois, thereby conferring specific Illinois jurisdiction.

In its reply, Cincinnati did not dispute that Gatke was one of its suppliers of brake components, however, Cincinnati maintained that Gatke was not its exclusive brake components supplier and that that Gatke brake components were not manufactured in Illinois. Further, that without proof that Gatke was the exclusive supplier brake components to Cincinnati, the plaintiff could not establish that he was exposed to Gatke brake components manufactured in Illinois. Cincinnati argued further that the lack of evidence presented by the plaintiff and the unrebutted testimony presented by Cincinnati would require the court to assume that the plaintiff was exposed to Gatke components manufactured in Illinois in order to find specific jurisdiction against Cincinnati.

In support, Cincinnati cited the testimony of the plaintiff and the Cincinnati corporate representative. The plaintiff testified that he could not identify the manufacturers of any of the brake components contained in the Cincinnati mechanical presses at Steelcase. Cincinnati's representative testified that Gatke was not Cincinnati's exclusive supplier of asbestos brake components. Rather, Cincinnati obtained brake components from at least five suppliers: Gatke, Johns Manville, Abex, American Brake Block, and Wichita Clutch. In addition, Gatke asbestos brake components were not manufactured in Illinois—they were manufactured in Warsaw, Indiana, and Brookfield, Massachusetts. There also were no Cincinnati records identifying which of the manufacturers supplied the brake components to Cincinnati in the mechanical presses sold to Steelcase.

As to the plaintiff's second basis to deny Cincinnati's motion, he cited to the existence of two Cincinnati facilities in Illinois. In response, Cincinnati's representative testified that any Cincinnati mechanical presses located at Steelcase in Grand Rapids, Michigan, were manufactured in Ohio and distributed through the Cincinnati representative located in Grand Rapids, Michigan. Cincinnati also addressed the existence of its two Illinois facilities: one of the facilities was a distributor that did not have authority to produce or deliver any Cincinnati machinery to Michigan; and the other facility manufactured coil processing equipment. However, that facility never sold equipment in Michigan, and the plaintiff did not testify to an exposure to Cincinnati coil processing equipment.

At the hearing on June 15, 2021, the court questioned whether assumption or speculation was required to find in favor of the plaintiff. In ruling from the bench, the trial court denied Cincinnati's motion stating that there was enough circumstantial evidence and logical corollaries that would demonstrate that Gatke was a supplier of asbestos brake components, and that Cincinnati had a relationship with Illinois sufficient to confer jurisdiction.

On June 21, 2021, Cincinnati filed its motion for leave to appeal, which was granted on July 16, 2021. On September 9, 2021, Cincinnati dismissed its appeal pursuant to settlement.

Doane v. A.W. Chesterton Company, No. 2020L013085 (Cir. Ct. Cook Cnty. Jun. 15, 2021).

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