



## **The IDC Monograph**

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## **The Impact of the Occupational Safety and Health Act on Asbestos Litigation**

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This country has had a long and convoluted history with asbestos. Asbestos is a generic term applied to a number of naturally occurring hydrated, fibrous, silicate minerals.<sup>1</sup> Asbestos was once known as the “magic material,” an apt moniker due to its strength, fire resistance, and insulating properties.<sup>2</sup> As such, for many years, asbestos was widely used throughout the United States as an insulant and fire retardant and was utilized for many different purposes, such as textiles, thermal and electrical insulation, roofing, flooring, friction materials, and millboard.<sup>3</sup> In asbestos cases, plaintiffs claim that during the production, use, and handling of asbestos products, tiny asbestos fibers are released into the air.<sup>4</sup> Plaintiffs also claim that asbestos fibers are released or disturbed during the removal of asbestos-based insulation in the demolition and maintenance of ships and old buildings.<sup>5</sup> Plaintiffs present experts to testify that when inhaled, asbestos fibers settle in the lungs and can even travel to other organs. Plaintiffs in asbestos cases contend that asbestos is linked to diseases such as asbestosis, mesothelioma, lung cancer and even cancers of other regions, such as the heart and colon.

Decades into asbestos litigation, plaintiffs are continually seeking new defendants to replace the staggering number of companies that have declared bankruptcy at the hands of asbestos litigation. Originally, the sole defendants in asbestos litigation were often insulation companies. In 2023, asbestos lawsuits include a variety of peripheral defendants, such as potential suppliers and contractors that may have been present at a plaintiff’s work site.

In 2022, there were approximately 3,550 asbestos lawsuits filed in the United States. The number of asbestos filings has remained fairly consistent over the past couple of years.<sup>6</sup> The Circuit Court of Madison County, Illinois, has maintained its position as the jurisdiction with the largest number of asbestos lawsuits filed annually, with 964 asbestos lawsuits filed in 2022.<sup>7</sup> The Circuit Court of St. Clair County, Illinois, took the number two position with 443 lawsuits filed in 2022.<sup>8</sup> *Id.* The Circuit Court of Cook County, Illinois, ranked seventh in the nation with 99 lawsuits filed in 2022.<sup>9</sup> *Id.* There were asbestos verdicts reported across the country in 2022, including those from Louisiana, Pennsylvania, New Jersey, South Carolina, California, Oregon, New York, Missouri and New York. In August 2022, the largest verdict was reported out of New York, at \$120 million.<sup>10</sup> Fifty years after OSHA first promulgated standards regulating asbestos, it continues to be a driving force in litigation across the country. Before examining the impact of OSHA on the remaining players in asbestos litigation, it is important to consider the history of OSHA.

### *History of Pre-OSHA Regulation of Asbestos*

In 1918, the first incidents of asbestos disease were published. They were described from x-ray results of 15 individuals that had been exposed to asbestos.<sup>11</sup> In 1927, a foreman in the weaving department of an asbestos plant in Massachusetts filed the first workers' compensation claim for asbestos-related disease.<sup>12</sup> In 1931, the International Labour Office, an organization to which the United States belonged, published recommendations for industrial hygiene practices and asbestos-related legislation. The publication acknowledged that insurance companies in the United States and Canada often refused insurance coverage to individuals who frequently worked around asbestos due to the high risks of exposure-related disease.<sup>13</sup>

By 1942, eight states had adopted legal standards intended to regulate airborne dust containing asbestos. California, Colorado, Massachusetts, Michigan, North Carolina, Oklahoma and Pennsylvania set the level at five million particles of asbestos per cubic foot of air (mppcf); South Carolina setting the level at 15 mppcf.<sup>14</sup> These standards, based on a 1938 study published by the United States Public Health Service (USPHS), became the first proposed limits based on medical evidence of the effects related to dust measurement. The USPHS study recommended a level of five mppcf, as the appropriate guidance on concentration levels.<sup>15</sup>

The USPHS recommendation remained the standard for the next 30 years, and was adopted by non-governmental organizations, such as the American Conference of Governmental Industrial Hygienists, as their Threshold Limit Value. In 1968, the USPHS lowered its proposed guidance limit to two mppcf.<sup>16</sup> However, in 1956, Dr. Herbert Stokinger of the USPHS warned that "the threshold limits are nothing but educated guesses," hinting that the threshold limit value would likely be lowered based on future medical evidence.<sup>17</sup>

In 1968, the British Occupational Hygiene Society ("BOHS") developed the first modern approach to setting an asbestos standard and federal statutory requirements. A subcommittee of the BOHS evaluated data from 290 men working in an asbestos factory. Of these 290 men, x-ray evidence found that eight had asbestos disease and an additional 16 had rales, a crackling sound from the lungs that is indicative of exposure to asbestos. As a result of this study, the British government adopted a standard that prescribed control measures for facilities that had asbestos levels of greater than two mppcf, including mandatory respiratory protection for facilities that had asbestos levels of greater than 12 mppcf.<sup>18</sup>

The first federal agency in the United States to recommend a permanent and total ban on asbestos and/or asbestos-containing materials specifically in the workplace was the National Institute for Occupational Safety and Health (NIOSH) in December 1976.<sup>19</sup> In 1976, NIOSH commissioned a study that reported the "evaluation of all available human data provides no evidence for a threshold or for a 'safe' level of asbestos exposure."<sup>20</sup> Despite these findings, asbestos was not banned altogether.

Nonetheless, there were several Acts of Congress that lowered the permissible levels of asbestos in certain locations or occupations. For example, The Walsh-Healey Act, passed as part of the New Deal Legislation under President Franklin D. Roosevelt, was the first federal law that introduced many safety provisions regarding the air concentration level of asbestos particles for contractors performing federal supply contracts.<sup>21</sup> Moreover, The Long Shoremen's Act of 1960, which covered all dock workers, adopted the five mppcf level that had been recommended by the USPHS.<sup>22</sup>

### *Passage of the Occupational Safety and Health Act and Subsequent Action*

The 1970 Occupational Safety and Health Act (OSHA) provided the federal government with the means to regulate a standard of asbestos permissibility throughout the United States, rather than relying on an uncoordinated fluctuating effort by each state.<sup>23</sup> In the first 25 years of OSHA, asbestos regulation progressed more quickly than ever before. Asbestos regulation was now coordinated throughout the country, as opposed to the piecemeal approach that had been in place. Between 1970-1995, OSHA issued two Emergency Temporary Standards (ETS) for asbestos, three final asbestos standards, and 31 Federal Register notices relating to the regulation of asbestos.<sup>24</sup>

On May 29, 1971, OSHA issued its first regulation on asbestos for general industry. OSHA used the asbestos standard that had been developed from consensus standards previously adopted by the Walsh-Healy Act, which were revised to lower asbestos levels to 12 fibers/m<sup>3</sup>, for contractors performing federal supply contracts.<sup>25</sup> The fibers/m<sup>3</sup> approach replaced the former method using mppcf to estimate asbestos levels, and it only counted fibers measuring greater than five micrometers in length.<sup>26</sup> However, this regulation was not binding, so OSHA issued an ETS on December 7, 1971, to reduce the levels of asbestos in the workplace. This ETS prevented peak exposure for over 10 fibers/m<sup>3</sup> for up to 15 minutes in an hour, for up to five hours in an eight-hour day. Furthermore, respirators were mandatory in situations when this peak exposure was too low for the specific situation or workplace. OSHA reasoned that the ETS was essential because asbestos in “working conditions constituted a grave danger and that an ETS was necessary.”<sup>27</sup>

While this first ETS went into effect essentially unchallenged, a second ETS issued in 1983 was invalidated by the Fifth Judicial Circuit.<sup>28</sup> In the case of *Asbestos Information Association v. O.S.H.A.*, the court ruled that while OSHA may continue to increase enforcement of the current permissibility standard, substantial evidence did not exist to support a six-month ETS.<sup>29</sup> The court further held that OSHA may lower the permissibility standard, but not by use of an ETS, as the very nature of an ETS implies that there is a grave and necessary need for immediate action.<sup>30</sup> The Fifth Judicial Circuit relied on a ruling by the United States Supreme Court in *Industrial Union Department v. American Petroleum Institute*, which held that before the regulatory body could enact any permanent health or safety standard, a threshold finding must be made that the place of employment is unsafe in the sense that significant risks are present and can be eliminated or lessened by a change in practices.<sup>31</sup> The key consequence of this holding was that all future proposed standards would require a risk analysis of both the current level of asbestos, as well as the lessened risk at the proposed new level of asbestos.<sup>32</sup>

The most seminal regulation on asbestos in the workplace was OSHA’s first final asbestos standard established on June 7, 1972.<sup>33</sup> This standard replaced the ETS that had gone into effect on December 7, 1971, and was based on a NIOSH recommendation for a proposed asbestos standard that encompassed work practices, environmental monitoring, medical surveillance, labeling of asbestos-containing materials, personal protective equipment and record keeping. NIOSH additionally recommended that OSHA set a permissible exposure limit of two fibers/m<sup>3</sup> with peak exposures limited to not over ten fibers/m<sup>3</sup>.<sup>34</sup> This was different than anything that had been previously implemented to reduce the amount of asbestos in the workplace. Until these recommendations, no federal agency had ever mandated limits on asbestos in the workplace.

On April 26, 1978, the Secretary of Health, Education, and Welfare, Joseph A. Califano, Jr., held a press conference warning of the dangers of handling asbestos. After this press conference, the U.S. Surgeon General sent a three-page “physician advisory” to the more than 400,000 physicians in the United States outlining the hazards of asbestos. This was the first organized governmental effort to alert physicians about the dangers of exposure to asbestos and informed doctors that “exposures as short as a month may result in disease many years later.”<sup>35</sup>

In 1979, the Director of OSHA, Dr. Eula Bingham, and the Director of NIOSH, Dr. Anthony Robbins, teamed together to evaluate the effectiveness of the 1972 OSHA asbestos standards. Together, Dr. Bingham and Dr. Robbins determined that there was no safe level of exposure to asbestos and that OSHA's current permissible exposure limit of two fibers/m<sup>3</sup> was not sufficient. They also found that individuals could become exposed to asbestos and its adverse effects simply by living in the same house as someone who works around asbestos or by living near an asbestos-contaminated area. Dr. Bingham and Dr. Robbins recommended that manufacturers of asbestos-containing products should conduct clear monitoring of any exposure that could result from any foreseeable use or even misuse of an asbestos-containing product.<sup>36</sup>

As a result of this joint venture, on June 20, 1986, OSHA published two new asbestos standards, one covering general industry<sup>37</sup> and the other covering the construction industry.<sup>38</sup> These standards reduced the permissible exposure limit of asbestos to 0.2 fibers/m<sup>3</sup>. OSHA's assessment of risk determined that these new asbestos standards would prevent approximately 7,800 cancer deaths attributable to exposure to asbestos over a 45-year working lifetime. Despite Dr. Bingham's prior finding in the joint venture with Dr. Robbins from NIOSH that there was no safe level of asbestos, OSHA reasoned that 0.2 fibers/m<sup>3</sup> was the lowest that was feasible due to technological and economic impossibilities at that time.

The U.S. Court of Appeals for the District of Columbia questioned this permissible exposure level, asking OSHA to explain why 0.1 fibers/m<sup>3</sup> was not possible as several industries had already lowered their levels to below 0.1 fibers/m<sup>3</sup>.<sup>39</sup> Due in part to this ruling, OSHA established a third final standard on July 20, 1990, to align with the ruling and NIOSH's permissible exposure level recommendation of 0.1 fibers/m<sup>3</sup>. The new standard also required all employers to communicate information regarding asbestos hazards to other employers and to employees.<sup>40</sup> This standard of 0.1 fibers/m<sup>3</sup> remains the OSHA standard to date.

### Impact of OSHA on Asbestos Litigation

The 1972 promulgation and effective date of the Occupational Safety and Health Act (OSHA) has had a significant impact on current asbestos litigation. In asbestos cases, plaintiff claims against defendants are based on the contention that defendants negligently failed to adequately warn plaintiffs about the hazards associated with exposure to asbestos products made, sold or used by defendants. Asbestos plaintiffs allege they were exposed to asbestos (1) while working with or in the vicinity of asbestos-containing products manufactured, sold or distributed by defendants; (2) while working with or around asbestos-containing products while present at defendants' premises; (3) from contractors working with asbestos-containing products in the plaintiffs' vicinities; or (4) while working in the presence of others using asbestos-containing products during plaintiffs' employment with defendants. While most asbestos plaintiffs claim they personally worked with or around asbestos-containing products, some plaintiffs contend they were exposed to asbestos by being in proximity to a family or household member's asbestos-laden clothing, vehicle, home or person. Plaintiffs allege they developed an asbestos-related disease caused or contributed to by these exposures to asbestos.

Defendants often raise a "state-of-the-art" defense in asbestos cases. "State-of-the-art" is the concept that refers to what was known or "should" have been known by companies about the hazards of asbestos arising from use of their products or at their premises at a particular point in time. If a company was unaware of a hazard presented by a product or material, the company's lack of knowledge bolsters its position that it had no duty to warn the plaintiff. State-of-the-art is not a black and white concept because individuals and companies became aware of information at different times. Although today we have access to information about events occurring around the world almost instantaneously, this was not always the case.

To establish that a defendant acted negligently toward an asbestos plaintiff, a plaintiff must prove the existence of a duty, a breach of that duty, and an injury caused by that breach.<sup>41</sup> The existence of a duty is determined by an analysis of “whether a plaintiff and a defendant stood in such a *relationship* to one another that the law imposed upon the defendant an obligation of reasonable conduct for the benefit of the plaintiff” (emphasis added).<sup>42</sup> “Unless plaintiff demonstrates that a duty is owed, there can be no negligence imposed upon defendant.”<sup>43</sup> If the injury was not foreseeable, no duty can exist.<sup>44</sup>

The Illinois Supreme Court imposes a knowledge requirement in failure-to-warn cases: the plaintiff must “prove the defendant manufacturer knew or should have known of the danger that caused the injury.”<sup>45, 46</sup> “Once it is established that knowledge existed in the industry of the dangerous propensity of the manufacturer’s product, then the plaintiff must establish that the defendant did not warn, in an adequate manner, of the danger.”<sup>47</sup>

The enactment of OSHA in the workplace on April 28, 1971, is a pivotal date for the state-of-the-art defense in asbestos litigation.<sup>48</sup> Once OSHA’s provisions took effect in 1972, employers were required to be aware of OSHA and take actions to warn and protect their employees from hazards associated with asbestos. Before OSHA, a legal level of acceptable exposure to asbestos encountered on the job was not available.<sup>49</sup> In asbestos cases involving pre-1972 asbestos exposures, defendants argue they should not be held to the OSHA standard because (1) they lacked knowledge of the dangerous propensity of asbestos; and (2) injury to plaintiff from exposure to asbestos was not foreseeable to defendants. For these early exposure cases, defendants argue that Illinois did not require a duty to warn because defendants did not know, nor should they have known, of the potential for danger. Even though OSHA applies only to employers, the wide-spread promulgation of its regulations raises the knowledge bar for all defendants, thus making it more difficult for them to claim that they lacked the knowledge required.<sup>50</sup> Parties also use the presence or absence of OSHA violations as support for a company’s overall adherence to asbestos safety practices. Often, these violations or lack thereof are completely irrelevant to whether civil liability exists.

Defense arguments pertaining to OSHA vary depending upon the company’s evidence of compliance with OSHA regulations at a particular point in time. Since asbestos claims go back decades, companies often do not retain OSHA related records from the time a plaintiff’s alleged asbestos exposures occurred. If there were any OSHA claims, investigation or citations against a defendant, the defendant will move to exclude this evidence as irrelevant and prejudicial. Defendants take the position that an OSHA violation is irrelevant unless it occurred at the exact location, circumstances and time the plaintiff was present at the defendant’s facility (if the plaintiff was ever present at defendant’s facility, which is infrequently the case). This argument is even stronger if a plaintiff is attempting to present evidence of OSHA violations or investigations at a premises when the allegations regarding exposures to asbestos pertain to the defendant’s products.

OSHA violations have also been a constant subject of litigation. Namely, whether they may constitute evidence of negligence versus creation of statutory duty. The introduction of evidence of OSHA violations is arguably immaterial to negligence allegations in asbestos cases and would result in unfair prejudice to the defendant.

Conversely, defendants take the position that compliance with OSHA warnings, testing and monitoring at their facilities support the assertion that they are companies which value the safety of their employees. Defendants seek to present evidence of OSHA compliance to support the inference that the defendants used reasonable care. If defendants followed OSHA’s safety rules, they contend they took precautions deemed reasonable at the time to safeguard a plaintiff’s health.

In *Ross v. Dae Julie, Inc.*, the plaintiff brought a negligence action against Dea Julie following a construction site accident.<sup>51</sup> The trial court granted a summary judgment motion based on lack of duty.<sup>52</sup> On appeal, Ross argued that Julie breached its duty of care by “failing to observe Occupational Safety and Health Administration (OSHA) regulations and



American National Standards Institute (ANSI) standards when it removed the pipe railing from the mezzanine and failed to replace, thereby creating an unreasonably dangerous working condition.”<sup>53</sup> The Court quickly dismissed the claims ruling that “while alleged violations of codes which do not contain language creating a statutory duty may be evidence of failure to exercise reasonable care, the violations do not create a duty where none otherwise exists. Neither a violation of OSHA regulations nor a violation of ANSI standards creates a statutory duty. Accordingly, the alleged violations of these safety regulations and standards cannot create a duty. Accordingly, the law of the land supports a claim that OSHA code violation may be introduced as evidence of negligence, however, it may likely not serve as a sole basis to establish duty.”<sup>54</sup>

Beginning in 1972, OSHA standards required companies to place labels on products warning consumers of the hazards associated with asbestos. OSHA’s product labeling requirements have evolved over time.<sup>55</sup> Prior to OSHA’s labeling requirement, no statutory or regulatory requirements were placed on product manufacturers to place warnings on their products. A defendant’s adherence to OSHA’s labeling requirements may be interpreted as evidence that the defendant met its duty to warn a plaintiff who used its products. Manufacturers posture that plaintiffs’ failure to warn claims must fail if a manufacturer placed OSHA compliant warnings on its products. On the other hand, plaintiffs take the position that defendant’s compliance with OSHA’s labeling requirement does not discharge its duty of care. Plaintiffs reason that product manufacturers have a non-delegable duty to produce safe products. This duty cannot be discharged or preempted by evidence of compliance with OSHA asbestos regulations. Plaintiffs claim that OSHA regulations are only relevant to determine whether a defendant acted with less than reasonable care.

### **Expert Testimony Regarding Permissible Exposure Limited Compliance**

It seems reasonable for a defendant to assert that expert testimony about the defendant’s Permissible Exposure Limit (PEL) compliance at the time of the exposure is question is evidence of compliance with industry standards and successful attempts to ensure a safe work environment and safe work with an asbestos-containing product. Unfortunately, Illinois law does not agree. Product manufacturers are not allowed to introduce PEL levels to show compliance with OSHA requirements as evidence of a safe work environment.

In *Zickuhr v. Ericsson, Inc.*, the defendant attempted to introduce OSHA asbestos regulations into evidence claiming that the regulations establish that the asbestos-containing wire at issue did not require a warning label because the amount of asbestos fiber released by the wire fell within the permissible exposure limit.<sup>56</sup> The defendant had retained a professional engineer to testify that the defendant complied with OSHA regulations.<sup>57</sup> The trial court excluded such evidence, finding that OSHA regulations apply only to employer-employee relationships and, since the decedent was not defendant’s employee, OSHA regulations were irrelevant.<sup>58</sup>

On appeal, the defendant argued that the exclusion of OSHA regulations was prejudicial.<sup>59</sup> The First District Court of Appeals, however, found that the defendant did not provide any authority to show that OSHA regulations may be used by a product’s manufacturer.<sup>60</sup> Conversely, the plaintiff cited a long string of cases that supported the proposition that OSHA does not regulate the defendant’s conduct.

The First District’s analysis derived from OSHA’s asbestos regulation, 29 C.F.R. Section 1910.1001, which only references that an employer has duties to the employee, not the duties to a manufacturer.<sup>61</sup> “Employers who are manufacturers are discussed in the OSHA asbestos regulation; however, § 1910.1001(j)(5) clarifies that employers who are manufacturers of asbestos products must comply with OSHA’s hazard communication standard at § 1910.1200(g) as opposed to the OSHA asbestos regulation that Ericsson sought to admit into evidence.”<sup>62</sup> Since OSHA regulations did not apply to this defendant, the First District agreed the regulation was irrelevant and that its exclusion was proper.<sup>63</sup>

The *Ericsson* decision was rather shocking to defendants attempting to show they complied with industry standards at the time in question. Nevertheless, the Court set clear boundaries that a defendant's standards must be relevant to the underlying action against that particular defendant. While *Ericsson* appears to put a leash on product manufacturers' ability to incorporate compliance with OSHA into their defenses, decisions in other cases restored the ability to use OSHA as a shield.

In *Gillespie v. Edmier*, the plaintiff worked as a truck driver, who had climbed on top of a dump truck trailer and, when walking down, his hand and foot slipped causing him to fall off the trailer.<sup>64</sup> In his deposition, the plaintiff's expert opined that the dump truck trailer was unreasonably defective and did not comply with the recommended practices of OSHA.<sup>65</sup> In response, the defendant moved for a summary judgment arguing that OSHA recommendations do not apply to trailers and that industry standards are not mandatory. The trial court agreed and found that the defendant built the trailer pursuant to specifications and a third party later modified the trailer.<sup>66</sup>

On appeal, the Illinois Supreme Court noted that it had already addressed this issue in *Schultz v. Northeast Illinois Regional Commuter R.R. Corp.*<sup>67</sup> In *Schultz*, the Illinois Supreme Court established that experts may rely on OSHA and other safety standards for the limited purpose of explaining the basis for the expert's opinions (without admitting the reliance testimony as substantive evidence).<sup>68</sup>

In *Schultz*, one of the issues addressed by the Illinois Supreme Court was whether the trial court erred in allowing the plaintiff's expert to testify that various government regulations, such as OSHA, were evidence of the standard of care in an action brought under the federal Employers' Liability Act (45 U.S.C.A. § 51 *et seq.* (1994)).<sup>69</sup> The defendant in *Schultz* argued that the plaintiff's expert should not have been allowed to testify that OSHA and other safety standards indicated a standard of care because they are inapplicable to the retaining wall where the plaintiff was injured.

Nonetheless, the Illinois Supreme Court concluded in *Schultz* that "an expert must be allowed to testify regarding the basis for his opinion because an expert's opinion is only as valid as the reasons that underlie it . . . Accordingly, this highest court determined that the expert's testimony was simply intended to support his expert opinion that defendant was negligent."<sup>70</sup>

After its analysis of *Schultz*, the *Gillespie* court held that the defense expert's testimony that the dump truck's steps and rails conflicted with OSHA protocol and other industry guidelines was sufficient to create a genuine issue of material fact and the trial court granted summary judgment in favor of defendant in error.<sup>71</sup>

Moving on to warnings, *Ericsson* appears to allow parties the opportunity to present evidence regarding compliance with warning or labeling requirements.<sup>72</sup> The First District at least acknowledged that the employers and product manufacturers are mentioned in § 1910.1200(g).<sup>73</sup> Moreover, as early as 1972, the applicable OSHA asbestos provisions placed an obligation to include caution signs where airborne concentration of asbestos fibers may be in excess of the exposure limits, place signs to take necessary protective steps before entering the area marked by signs, caution labels to be affixed to all raw materials, mixtures, scrap, waste, debris and other products containing asbestos fibers.<sup>74</sup>

In *Garrelts v. Honeywell International, Inc.*, the plaintiff sued various manufacturers and distributors of asbestos and asbestos-containing products.<sup>75</sup> On cross examination of a defendant corporate representative, the plaintiff's attorney asked whether the defendant warned its employees about possible harms from asbestos exposure.<sup>76</sup> The corporate representative testified that, in 1983, the manufacturer began placing labels on its products indicating its gaskets and packing contained asbestos.<sup>77</sup> Interestingly, the plaintiff did not argue that the defendant was not allowed to show compliance with OSHA, as the plaintiff's motive was to show that defendant failed to do so before 1983.<sup>78</sup> While the trial court and the Fourth District agreed that the plaintiff was not allowed to introduce labeling compliance since they were put into place after the exposure as remedial measure, the issue of OSHA regulations being applicable to employers

only did not come up, likely, because the plaintiff opened the door to seek admission of the evidence to demonstrate lack of compliance.<sup>79</sup>

Next, in *Gray v. National Restoration Systems, et al.*, the plaintiff brought a survival action for injuries resulting from an explosion at the workplace.<sup>80</sup> The defendants had provided concrete repair, waterproofing, and caulking services for the restoration project.<sup>81</sup> One defendant had manufactured a concrete waterproofing product called Chem-Trete BSM 20, and attached a warning to every container that the product was flammable liquid and vapor.<sup>82</sup> On appeal in the First District, Plaintiff alleged that the defendant had violated 29 C.F.R. § 1910.1200(f)(1)(ii) (2003), which stated “the chemical manufacturer, importer or distributor shall ensure that each container of hazardous chemicals leaving the workplace is labeled, tagged or marked with appropriate hazard warnings; and 29 C.F.R. § 1910.1200(f)(11) (2003), which stated that chemical manufacturers, importers, distributors, or employers who become newly aware of any significant information regarding the hazards of a chemical shall revise the labels for the chemical within three months of becoming aware of the new information.<sup>83</sup> Label on containers of hazardous chemical shipped after that time shall contain the new information.<sup>84</sup> If the chemical is not currently produced or imported, the chemical manufacturer, importers, distributor, or employer shall add the information to the label before the chemical is shipped or introduced into the workplace again; 29 C.F.R. § 1910.1200(g)(7)(i) (2003), which stated: distributors shall ensure that material safety data sheets, and updated information, are provided to other distributors and employers with their initial and with the first shipment after a material safety data sheet is updated; and 29 C.F.R. § 1910.1200(g)(7)(ii) (2003) which stated: the distributor shall either provide material safety data sheets with the shipped containers, or send them to the other distributor or employer prior to or at the time of the shipment.”<sup>85</sup>

In the trial date, two defendants, Huls (distributor) and Glenrock (manufacturer), moved to dismiss based on failure to state a cause of action.<sup>86</sup> The trial court granted the distributor’s motion for summary judgment and the manufacturer’s summary judgment motion.<sup>87</sup> The First District analyzed whether a duty to warn existed, *i.e.*, whether the OSHA regulations apply to the particular defendant. The court ruled that the regulations applied to “distributors.”<sup>88</sup> However, the court considered the definition of a “distributor”, which included “a business, other than a chemical manufacturer and importer, which supplies hazardous chemicals.”<sup>89</sup> For this reason, the OSHA regulations did not apply, and the First District sustained the trial court’s ruling.<sup>90</sup>

### OSHA Does Not Apply to All Asbestos Defendants

OSHA promulgated regulations to govern workplace hazards within the relationship between employees and employer. OSHA’s original purpose was to provide, so far as possible, every working man and woman in the nation, safe and healthful working conditions and to preserve our human resources.<sup>91</sup> OSHA was intended only to impose duties on employers to protect employees.<sup>92</sup> In Illinois, OSHA does not place a nondelegable duty on a general contractor for the safety of an independent contractor’s employees.<sup>93</sup> This can shift the allocation of fault in asbestos cases when a plaintiff alleges exposure to asbestos attributable to a premises owner or another contractor present on the job site which is not the plaintiff’s employer. Defendants may use the lack of specific OSHA requirements to support an argument that the premises owner or contractor did not have a duty to protect the plaintiff and that the law, through OSHA, placed the responsibility for protecting the plaintiff on the party in the best position to protect the plaintiff—the plaintiff’s employer.

OSHA does not extend to employees of other companies or family members of employees. In asbestos cases, plaintiffs sometimes claim exposure to asbestos carried home on the clothing or person of a family member who worked with asbestos-containing products. In these secondary exposure cases, the injured plaintiff does not fall under OSHA’s



class of protected persons.<sup>94</sup> Plaintiffs argue that defendants should not be permitted to bring evidence of their own OSHA compliance in these cases since OSHA does not affect any duties owed to the injured plaintiff.

### **Limitations on OSHA's Authority to Set Standards**

Toxic tort defendants are often faced with assertions that they had a duty to make a workplace safe without any regard to the cost or extent of the safety provisions. However, even the United States Supreme Court has held that OSHA does not have authority to set standards that workplaces are entirely without risk.<sup>95</sup>

The Occupational Safety and Health Act of 1970 (Act) delegates broad authority to the Secretary of Labor (Secretary) to promulgate standards to ensure safe and healthful working conditions for workers.<sup>96</sup> However, this authority is not unlimited. As a threshold matter to the promulgation of a new standard, OSHA is required to find that a particular substance poses a significant health risk in the workplace, and that a new, lower standard is therefore “reasonably necessary or appropriate to provide safe or healthful employment and places of employment.”<sup>97</sup> OSHA defines an “occupational safety and health standard” as a standard that is “reasonably necessary or appropriate to provide safe or healthful employment.”<sup>98</sup> Where toxic materials or harmful physical agents are concerned, a standard must also comply with § 6(b)(5), which directs the Secretary to “set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity.”<sup>99</sup> When the toxic material or harmful physical agent to be regulated is a carcinogen, the Secretary has taken the position that no safe exposure level can be determined and that § 6(b)(5) requires the Department of Labor to set an exposure limit at the lowest technologically feasible level that will not impair the viability of the industries regulated.<sup>100</sup>

In the *Marshall* case, producers of benzene filed a petition for review of a new health standard promulgated by the OSHA limiting occupational exposure to benzene. The Fifth Circuit Court of Appeals held that the new standard was invalid.<sup>101</sup> Benzene is an allegedly toxic substance used in manufacturing such products as motor fuels, solvents, detergents, and pesticides.<sup>102</sup> After determining that there was a causal connection between benzene and leukemia, the Secretary promulgated a standard reducing the permissible exposure limit on airborne concentrations of benzene from the consensus standard of 10 parts benzene per million parts of air (10 ppm) to 1 ppm and prohibiting dermal contact with solutions containing benzene.<sup>103</sup>

On pre-enforcement review, the Court of Appeals found the standard to be invalid and that OSHA had exceeded its standard-setting authority.<sup>104</sup> The Appellate Court reasoned that OSHA had not shown that the lower 1 ppm exposure limit or the dermal contact ban were “reasonably necessary or appropriate to provide safe and healthful employment” as required by § 3(8).<sup>105</sup> Further, OSHA § 6(b)(5) does not give OSHA the unbridled discretion to adopt standards designed to create absolutely risk-free workplaces regardless of cost.<sup>106</sup> OSHA cannot act on assumptions under the Act.<sup>107</sup>

The United States Supreme Court upheld the appellate court’s refusal to enforce the lower standard.<sup>108</sup> The Supreme Court held that reducing the permissible exposure limit on airborne concentrations of benzene from the consensus standard of ten parts benzene per million parts of air to one part per million, was unenforceable since the standard was not supported by appropriate findings.<sup>109</sup> OSHA’s rationale for lowering the permissible exposure limit was not based on actual findings, but on the assumption that lowering the threshold exposure limit would result in some reduction in cases of leukemia caused by benzene exposure.<sup>110</sup>

The OSHA Act implies that before OSHA promulgates any new health or safety standard, it must have a finding (1) that the workplaces at issue pose a significant health risk; and (2) that those risks can be eliminated or lessened by a change in practices.<sup>111</sup> Before OSHA can act, it must find that the toxic substance in question poses a significant health

risk in the workplace and that a new, lower standard is therefore “reasonably necessary or appropriate to provide safe or healthful employment and places of employment.”<sup>112</sup>

The Court held that the statute was not designed to require employers to provide an absolutely risk-free workplace when technologically feasible without regard to cost to the industry.<sup>113</sup> To be considered “unsafe”, a workplace must present a significant risk of harm. The Court stated that “safe” is not synonymous with “risk-free.”<sup>114</sup> The Supreme Court specifically noted that the Secretary is required to make this threshold finding of significant risk under sec. 6(b)(5) to promulgate standards for “toxic materials” and “harmful physical agents”. The Court further concluded that the OSHA Act’s legislative history supports the conclusion that “Congress was not concerned with absolute safety, but with the elimination of significant harm.”<sup>115</sup>

Justice Powell’s concurrent opinion would take into consideration whether the anticipated expenditures attendant to a new regulation are proportionate to the expected health and safety benefits.<sup>116</sup> In this instance, OSHA represented that the “substantial costs” of the benzene regulations were justified but failed to present adequate evidence of its conclusion.

As plaintiffs continually raise claims that existing or new substances cause harm, defense attorneys should monitor the evolution of OSHA for any impending regulations that may impact their clients and be prepared to act proactively if OSHA initiates a new regulation scheme that may be detrimental to their clients’ business. *Marshall* demonstrates that OSHA may be challenged if it oversteps its authority. While OSHA has broad authority, that authority does not extend to setting forth regulations to ensure that a workplace is entirely risk free if the cost is so great that it compromises the industry itself.

## (Endnotes)

<sup>1</sup> INTERNATIONAL AGENCY FOR RESEARCH OF CANCER WORKING GROUP, ARSENIC, METALS, FIBRES, AND DUST 219 (Antero Aitio et al. eds., 2012 ed.).

<sup>2</sup> Paul Brodeur, *The Magic Mineral*, THE NEW YORKER, Oct. 4, 1968, at 117-165.

<sup>3</sup> ARSENIC, METALS, FIBRES, AND DUST, *supra* n. 1, at 221.

<sup>4</sup> *Id.* at 224.

<sup>5</sup> *Id.*

<sup>6</sup> See Heather Isringhausen Gvillo, *KCIC report: Madison, St. Clair Counties See Most Asbestos Filings for 2022; Cook County ranked #7*, MADISON-ST. CLAIR RECORD (April 11, 2023).

<sup>7</sup> *See Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

- <sup>10</sup> HARRIS MARTIN, *New York Court Reverses \$120 Million Asbestos Cosmetic Talc Judgment, Cites Lack of Sufficient Evidence* (Aug. 23, 2022), available at <https://www.harrismartin.com/publications/1/asbestos/articles/29629/new-york-court-reverses-120-million-asbestos-cosmetic-talc-judgment-cites-lack-of-sufficient-evidence/> (subscription required). The New York appellate court reversed the \$120 million judgment because the plaintiffs’ medical expert failed to “set forth a scientific expression of minimum lifetime exposure to asbestos that would have been sufficient to cause mesothelioma, the disease in question.”
- <sup>11</sup> H.K. Pancoast, et al., *A Roentgenologic Study of the Effects of Dust Inhalation upon the Lungs*, AMERICAN J. OF ROENTGENOLOGY, 1918, at 97.
- <sup>12</sup> A.J. Lanza, *Asbestosis*, JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION, 1936, at 368.
- <sup>13</sup> INTERNATIONAL LABOUR OFFICE, OCCUPATIONAL AND HEALTH ENCYCLOPEDIA OF HYGIENE, PATHOLOGY AND SOCIAL WELFARE, A-H. VOL. 1 (1930).
- <sup>14</sup> *Transaction of the Fifth Annual Meeting of the National Conference of Governmental Industrial Hygienists*, 77<sup>th</sup> Cong. (Joint Meeting with the Industrial Health and Medicine, Health and Medical Committee on Apr 9 – 10, 1942).
- <sup>15</sup> W.D. Dreessen, et al., *A Study of Asbestosis in the Asbestos Textile Industry*, PUBLIC HEALTH BULLETIN 241 (1938).
- <sup>16</sup> AMERICAN CONFERENCE GOVERNMENTAL INDUSTRIAL HYGIENISTS, THRESHOLD LIMIT VALUES—DISCUSSION AND THIRTY-FIVE YEAR INDEX WITH RECOMMENDATIONS 233-234 (Marshall E. LaNier, ed., Vol. 9, 1968).
- <sup>17</sup> H.E. Stokinger, Prepared discussion to the American Industrial Hygienists Association (1956).
- <sup>18</sup> Morris Greenberg, *Revising the British Occupational Hygiene Society Asbestos Standard: 1968-1982*, AMERICAN J. OF INDEPENDENT MEDICINE, July 2006, at 577.
- <sup>19</sup> CENTER FOR DISEASE CONTROL, THE NATIONAL INSTITUTE FOR OCCUPATIONAL SAFETY AND HEALTH REVISED RECOMMENDED ASBESTOS STANDARD (Kenneth Bridbord et al., eds.) December 1976.
- <sup>20</sup> *Id.* at p. 92.
- <sup>21</sup> 41 U.S.C §§ 6501-6511.
- <sup>22</sup> 33 U.S.C. §§ 901-950.
- <sup>23</sup> 29 U.S.C. § 651.
- <sup>24</sup> John F. Martonik et al., *The History of OSHA’s Asbestos Rulemakings and Some Distinctive Approaches That They Introduced for Regulating Occupational Exposure to Toxic Substances*, AMERICAN INDUSTRIAL HYGIENE ASSOC., vol. 62, 2001, at 208-217.
- <sup>25</sup> Occupational Safety and Health Standards Miscellaneous Amendments, 36 FED. REG. 157 (1972).
- <sup>26</sup> Lane R.E., et al. *Hygiene standards for chrysotile asbestos dust*, THE ANNALS OF OCCUPATIONAL HYGIENE, 47-69 (Nov. 1968).
- <sup>27</sup> Emergency Standard for Exposure to Asbestos Dust. 36 FED. REG. 7 (1971).
- <sup>28</sup> *Asbestos Information Association v. O.S.H.A.*, 727 F.2d 415 (5th Cir. 1984).

<sup>29</sup> *Id.* at 427.

<sup>30</sup> *Id.*

<sup>31</sup> *Indus. Union Dept. v. Amer. Petroleum Inst.*, 448 U.S. 607, 608-609 (1980).

<sup>32</sup> *Id.*

<sup>33</sup> Standard for Exposure to Asbestos Dust,<sup>37</sup> FED. REG. 11318 (1972).

<sup>34</sup> CENTER FOR DISEASE CONTROL, THE NATIONAL INSTITUTE FOR OCCUPATIONAL SAFETY AND HEALTH REVISED RECOMMENDED ASBESTOS STANDARD (Kenneth Bridbord, et al.) Dec. 1976.

<sup>35</sup> Joseph A. Califano, Jr., Secretary, Department of Health, Education, and Welfare, Address to Physicians Regarding Asbestos (Apr. 26, 1978).

<sup>36</sup> NATIONAL INSTITUTE FOR OCCUPATIONAL SAFETY AND HEALTH, WORKPLACE EXPOSURE TO ASBESTOS—REVIEW AND RECOMMENDATIONS (Richard A. Lemen, et al., eds. April 1980).

<sup>37</sup> 29 U.S.C. § 1910.1001 (1986).

<sup>38</sup> 29 U.S.C. § 1926.1101 (1986).

<sup>39</sup> *Building and Const. Trades Dept. v. Brock*, 838 F.2d 1258, 1262 (D.C. Cir. 1988).

<sup>40</sup> Occupational Exposure to Asbestos, 153 FED. REG. 40964-41158 (1994).

<sup>41</sup> *Bajwa v. Metro. Life Ins. Co.*, 208 Ill. 2d 414, 421-422 (2004).

<sup>42</sup> *See Simpkins v. CSX Transp., Inc.*, 2012 Ill. 110662 (2012) (citing *Marshall v. Burger King Corp.*, 222 Ill.2d at 422, 436-437 (2006)).

<sup>43</sup> *Sandoval v. City of Chicago*, 357 Ill. App. 3d 1023, 1027 (1st Dist. 2005).

<sup>44</sup> *Simpkins*, 2012 IL 1106625.

<sup>45</sup> *McKinney v. Hobart Brothers Co.*, 2018 IL App.170333 (4th Dist. 1980).

<sup>46</sup> *Woodill v. Parke Davis & Co.*, 79 Ill. App. 2d 26, 36-37 (1980).

<sup>47</sup> *Id.*

<sup>48</sup> *See generally* FEDERAL REGISTER TITLE 29—LABOR, CH. XVII—OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, DEPARTMENT OF LABOR, STANDARD FOR EXPOSURE TO ASBESTOS DUST, FED. REG. 1972.

<sup>49</sup> *Woodill*, 79 Ill. App. 2d at 36-37.

<sup>50</sup> *Id.*; *see also* 29 CFR § 1910.1001.

<sup>51</sup> *Ross v. Dae Julie, Inc.*, Ill. App. 3d 1065, 1067 (4th Dist. 2003).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 1074.

<sup>54</sup> *Id.*

- <sup>55</sup> See 37 CFR 1910.93(g) (1972); 29 CFR 1910. 1001(j).
- <sup>56</sup> *Zickuhr v. Ericsson, Inc.*, 2011 IL App. (1st) 103430, ¶ 28.
- <sup>57</sup> *Zickuhr*, 2011 IL App. 103430, at \*87.
- <sup>58</sup> *Id.*
- <sup>59</sup> *Id.*
- <sup>60</sup> *Id.* at 88.
- <sup>61</sup> *Zickuhr*, 2011 IL App. 103430 at \* 88.
- <sup>62</sup> *Zickuhr*, 2011 IL App. 103430 at \* 88.
- <sup>63</sup> *Id.* at 88-89.
- <sup>64</sup> *Gillespie v. Edmier*, 2020 IL 125262 at \*56 (Ill. 2020).
- <sup>65</sup> *Gillespie*, 2020 IL at \*57.
- <sup>66</sup> *Id.*
- <sup>67</sup> *Id.* at \*59 (citing *Schultz v. Northeast Illinois Regional Commuter R.R. Corp.*, 201 Ill. 2d 260 (2002)).
- <sup>68</sup> *Schultz*, 201 Ill. 2d at 198-99.
- <sup>69</sup> *Schultz*, 201 Ill. 2d at 198-99.
- <sup>70</sup> *Gillespie*, 2020 IL at \*57 (citing *Schultz*, 201 Ill.2d at 298-99).
- <sup>71</sup> *Gillespie*, 2020 IL at \*60.
- <sup>72</sup> See *Zickuhr*, 2011 IL App. 103430.
- <sup>73</sup> *Zickuhr*, 2011 IL App. 103430 at \*88.
- <sup>74</sup> Standard for Exposure to Asbestos Dust, 37 Fed. Reg. 11318 (1972).
- <sup>75</sup> *Garrelts v. Honeywell International, Inc.*, 13 IL App. 120997-U (4th Dist. 2013), at \*1.
- <sup>76</sup> *Garrelts*, 13 IL App. 120997-U at \*19.
- <sup>77</sup> *Id.*
- <sup>78</sup> See *id.*
- <sup>79</sup> *Id.* at \*19.
- <sup>80</sup> *Gray v. National Restoration System Gray v. National Restoration Systems*, 354 Ill. App. 3d 345 (1st Dist. 2004).
- <sup>81</sup> *Gray*, 354 Ill. App. 3d at 348.
- <sup>82</sup> *Id.* at 348-49.
- <sup>83</sup> *Id.* at 349-50.



<sup>84</sup> *Id.* at 361.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 351-52.

<sup>87</sup> *Id.* at 352-54.

<sup>88</sup> *Id.* at 361.

<sup>89</sup> *Id.* at 361-62.

<sup>90</sup> *Id.*

<sup>91</sup> 29 U.S.C. § 651(b) (1970) (Congressional statement of findings and declaration of purpose and policy).

<sup>92</sup> *See id.*

<sup>93</sup> *Joyce v. Mastri*, 371 Ill. App. 3d 64 (1st Dist. 2007).

<sup>94</sup> *See generally* 29 U.S.C. § 29; U.S.C. § 651 *et seq.*

<sup>95</sup> *See Ind. Union Dept., AFL-CIO v. Amer. Petroleum Inst., et al.*, 100 S. Ct. 2844 (1980).

<sup>96</sup> *Ind. Union Dept., AFL-CIO*, 100 S. Ct. at 2846.

<sup>97</sup> *See Marshall*, 100 S. Ct. at 2846.

<sup>98</sup> OSHA Act of 1970, Section 3(8).

<sup>99</sup> *Ind. Union Dept., AFL-CIO*, 100 S. Ct. at 2849, citing 29 U.S.C. § 655(b)(5).

<sup>100</sup> *Ind. Union Dept., AFL-CIO*, 100 S. Ct. at 2849, citing 29 CFR §§1910.1028(c), (e) (1979).

<sup>101</sup> *Ind. Union Dept., AFL-CIO*, 100 S. Ct. at 2849-2850.

<sup>102</sup> *See Ind. Union Dept., AFL-CIO*, 100 S. Ct. at 2850.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 2850.

<sup>109</sup> *Id.* at 2858-2863.

<sup>110</sup> *Id.* at 2895-96.

<sup>111</sup> *See id.* at 2850.

<sup>112</sup> *Id.* at 2850.

<sup>113</sup> *Id.* at 2863-64.

<sup>114</sup> *Id.* at 2863-64.

<sup>115</sup> *Id.* at 2864.

<sup>116</sup> *Id.* at 2875-77.

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