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Out with the old, in with the new: What to expect in asbestos litigation in 2018

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With many traditional asbestos defendants now bankrupt, enterprising plaintiffs' lawyers are again shifting the target of asbestos litigation to novel defendants and theories. This new wave of asbestos litigation focuses on claimed exposures to everyday consumer products that may have been contaminated with trace amounts of asbestos.

While plaintiffs' lawyers are busy trying to build cases against companies in the retail and consumer products industry, recent Supreme Court decisions limiting where those companies can be sued and emerging scientific research also promise to shake up the asbestos litigation landscape in 2018.

At the same time, both the U.S. and Canadian governments plan to undertake comprehensive reviews of the potential risks to consumers posed by asbestos-containing products. These developments make 2018 a year to watch as asbestos litigation and regulation continue to evolve.

PLAINTIFFS' LAWYERS TURN ATTENTION TO THE RETAIL INDUSTRY

In recent years, companies in the retail sector have faced allegations that certain products were historically contaminated with asbestos, exposing unsuspecting consumers to harmful levels of the naturally occurring mineral.

In particular, companies that manufacture, distribute and sell talc-based products have become favorite targets of the plaintiffs' lawyers driving this new wave of asbestos litigation. In these cases, plaintiffs typically lack evidence of traditional occupational exposures to asbestos.

In the absence of occupational exposure, plaintiffs now commonly allege that various cosmetics or personal hygiene products, including eye shadows and other powder products, were contaminated with asbestos.

Specifically, plaintiffs allege that the products were manufactured using talc sourced from mines that were contaminated with asbestos. Plaintiffs claim that traces of asbestos made their way into finished products and that consumers were exposed when they used those products in the course of their daily routines.

This theory of causation is still unproven and is the subject of an intense debate involving complicated scientific questions that are difficult — if not impossible — to answer.

This new "contamination" litigation poses unique challenges to retailers who find themselves on the receiving end of a complaint alleging that the plaintiff was exposed to asbestos in a product manufactured decades ago.

Chains of complex corporate transactions can sow confusion for both plaintiffs and defendants as to which present-day companies may be liable for any particular plaintiff's claims. Because plaintiffs do not have access to the intricate details of those transactions, the challenge of determining which company holds the liabilities for their claims often results in casting a wide net to name all potential parties in an effort to ensure that the right defendant is ultimately named in the suit.

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Low pleading standards in plaintiff-friendly jurisdictions and the corresponding lack of pressure on plaintiffs to provide details of their claims in the early stages of their cases can quickly drive up defense costs — with defendant companies finding out only after discovery that that are not liable for injuries allegedly caused by products the plaintiff claims to have used.

In many cases, companies may not have retained any records or documentation about products for which they have legacy liability, especially where they may have divested their liabilities for those products many years ago. This predicament leaves companies unable to adequately assess the aggregate risk this new wave of asbestos litigation may pose to their businesses.

Like plaintiffs who pursue traditional asbestos litigation claims, plaintiffs in these lawsuits often allege exposure to dozens of different products over the course of several decades. But unlike

traditional asbestos litigation, which is often replete with company records of purchases, co-worker testimony and even precise military specifications for certain asbestos products, these new consumer-focused suits typically lack any evidence of product use or exposure other than the plaintiff's own testimony.

While the passage of time and the consequent loss of evidence (e.g., receipts and product packaging) can certainly make it difficult for plaintiffs to prove their case at trial, defendants are unlikely to see success on early motions to dismiss or motions for summary judgment where plaintiffs testify to having used their products and describe them accurately.

Moreover, cases that rest almost wholly on the plaintiff's testimony can leave companies particularly susceptible to unpredictable verdicts. This is especially true in cases involving products that have been household names for decades and have been mainstays in consumers' homes — meaning that juries are more likely than they are in other cases to understand the products at issue and identify with the plaintiff.

SUPREME COURT DECISIONS CREATE UNCERTAIN LANDSCAPE

Many of the companies facing these new theories of asbestos-contaminated products will be newcomers to the world of asbestos litigation, and they may be surprised to find themselves being haled into court in jurisdictions in which they have never before done business.

Asbestos litigation is notoriously concentrated in selected plaintiff-friendly jurisdictions that often have no connection to either the plaintiffs or the companies they have sued.

But recent decisions from the U.S. Supreme Court have handed valuable defenses to companies grappling with asbestos lawsuits today — even in the "judicial hellholes" traditionally marked by plaintiff success and eye-popping verdicts.

Since 2014, companies have been relying on the court's decision in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), to fight lawsuits filed against them in states where those companies are neither incorporated nor maintain their principal place of business.

Gone are the days when companies would be forced to defend against lawsuits in states simply because they may have done some business there. Now, a plaintiff must show a specific connection to the state in order to keep the suit there.

Last June, the Supreme Court announced yet another important restriction on the sort of forum-shopping that has long been the hallmark of asbestos litigation. In *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017), it held that nonresident plaintiffs cannot join their claims with those of resident plaintiffs — no matter how similar their claims may be — in order to force a company to defend against cases in states where the nonresident plaintiffs cannot show any other connection between their claims and the forum state.

Daimler and *Bristol-Myers* seem clear enough: A plaintiff can sue a company only where the plaintiff purchased or used its product, or where the company is incorporated or has its principal place of business.

But what about cases, and particularly consumer-focused asbestos cases, where the plaintiff claims to have used numerous products over the course of several decades in multiple states — and sues dozens of defendants scattered across the country?

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In those cases, plaintiffs will likely not be able to collect all the companies they want to sue in one state under *Daimler* and *Bristol-Myers*, leading some to wonder if courts in plaintiff-friendly jurisdictions will bend the rules and tee up yet another jurisdictional question for the Supreme Court in 2018.

EMERGING SCIENTIFIC DEFENSES TO PLAY KEY ROLE

While there is scientific debate about how much asbestos exposure is necessary to cause disease, most medical experts and courts have generally agreed that de minimis exposure is never enough. But now, new research suggesting that a genetic mutation may make certain individuals more likely to develop mesothelioma is gaining traction in courts across the country.

That means that in cases where the plaintiff claims to have had this genetic mutation, it just got harder for companies to win even if the evidence of exposure is minimal — unless those companies come prepared with a strategy to address these new scientific issues.

In 2011 researchers from the University of Hawaii Cancer Center and the Fox Chase Cancer Center in Philadelphia published the results of a study suggesting that people with a mutation in a gene called BAP1 may be more susceptible to developing mesothelioma.

Since that time, both plaintiffs' and defense lawyers have tried to use the findings to their advantage. On the plaintiffs' side, lawyers are arguing that the de minimis rule prevalent in most courts unfairly leaves those with the mutation without any means of recovery against defendants whose products exposed the plaintiff to asbestos — even if the level was very low.

And on the defense side, lawyers can argue that a previously unknown genetic mutation makes any harm to a plaintiff with

the mutation completely unforeseeable, even if a product had low levels of asbestos — or even that the genetic mutation itself may be the cause of the disease.

Particularly in this wave of "asbestos-contamination" cases, where the level of asbestos (if any) in products is extremely low, companies in the retail industry could find themselves facing complex scientific questions that are as new to asbestos litigation as they are.

Some courts will inevitably let juries decide whether the scientific theories developed by both sides have merit. But in many cases, this new research will provide companies with opportunities to advance strategic arguments early in a case, helping them build strong scientific defenses to the claims brought against them and potentially positioning them for quick dismissals.

INTERNATIONAL SPOTLIGHT ON ASBESTOS

Litigation is not the only focus for asbestos in 2018. Both the U.S. and Canadian governments are set to consider sweeping asbestos regulations this year, with far-reaching consequences for companies still tied to asbestos.

EPA to focus on asbestos-containing products still on the market

The Frank R. Lautenberg Chemical Safety for the 21st Century Act, signed into law June 22, 2016, required the Environmental Protection Agency to identify 10 high-priority substances on which to begin risk analyses within 180 days.

On Dec. 19, 2016, EPA identified asbestos as one of those 10 chemicals. The agency then released its "scope of the risk evaluation" for asbestos June 22, 2017.

On Jan. 31, EPA released its annual plan for the chemical risk evaluations it is required to perform under the Lautenberg Act. In the annual plan, EPA reiterated its commitment to conducting a risk evaluation for asbestos and announced that it would be issuing a "problem formulation" in early 2018, further refining the scope of the previously released risk evaluation.

When that problem formulation is released, EPA plans to solicit public comments for 45 days and take those comments into consideration before publishing its draft risk evaluation for asbestos.

Importantly, the risk evaluation will include a comprehensive review of the hazards of asbestos, including the risk posed to consumers by asbestos-containing products. As part of its initial scoping process, EPA undertook a review of asbestos-containing products still on the market and discovered that various products — including aftermarket automotive brake products, adhesives, roof coatings and gaskets — are readily available to U.S. consumers.

EPA also noted reports of imports into the United States of asbestos-containing products like woven clothing, yarn, thread, fabrics and building materials.

EPA's problem formulation document is expected to further focus on these products and examine inhalation, dermal and oral routes of exposure to consumers resulting from the use of those products.

If the agency determines that these products pose an unreasonable risk of injury to health or to the environment, companies can anticipate that EPA will promulgate new rules regulating the manufacture, distribution nd sale of those products within two years, as required by the Lautenberg Act.

Canada plans to ban asbestos by 2019

On Dec. 15, 2016 — just days before EPA announced that it would be undertaking a risk analysis for asbestos — the Canadian government announced that it would be taking action to ban asbestos by establishing new regulations under the Canadian Environmental Protection Act.

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The government released an outline of its proposed regulatory approach in April 2017 and released its draft regulations Jan. 5 after soliciting comments from the public.

Like EPA's scope of the risk evaluation for asbestos, Canada's proposed regulations focus on the continued availability of asbestos-containing products, including pest control products, floor and ceiling tiles, plaster, house siding, and vehicle brake pads.

The draft regulations would ban the manufacture, sale, import and export of asbestos and asbestos-containing products, subject to very limited exceptions.

The Canadian government acknowledged that EPA has undertaken a similar analysis and emphasized the importance of regulatory alignment between the United States and Canada in order to promote fair play and cooperation between businesses in the two countries.

We anticipate that Canada will pay close attention to EPA's release of its problem formulation for asbestos, which may provide important signals as to EPA's contemplated regulatory approach should it determine that asbestos poses an unreasonable risk to health or the environment.

Canada's final regulations are expected to be published in the fall of 2018 and will take effect in 2019.

WHAT'S NEXT?

In 2018, look for brand-new faces in asbestos litigation as retail and consumer product companies become more popular with plaintiffs' lawyers. As these new companies enter the world of asbestos litigation, we expect them to challenge the status quo by fighting to keep cases out of the classic forums for asbestos plaintiffs and developing sophisticated scientific defenses to these low-exposure claims.

Companies in the retail industry should also keep a close eye on the U.S. and Canadian governments, as the regulations both countries seem sure to implement will have important consequences for their businesses.

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