



more *Insight.*

An Update on Asbestos Law in West Virginia and Pennsylvania

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West Virginia Update

▶ Increased Discovery Activity Overall

- ▶ More exigent plaintiff depositions occurring
- ▶ Increased plaintiff's discovery of new defendants
 - ▶ 30(b)(7) depositions and document reviews
 - ▶ Creating scheduling issues with trial set cases and discovery process within CMO
- ▶ Increased lung cancer and non-malignant filings
Last five years primarily mesothelioma filings

West Virginia

- ▶ Increased non-WV plaintiff filings

- ▶ Availing of WV's "open door" policy as to non-resident plaintiffs' actions against non-resident companies
- ▶ Morris v. Crown Equipment Corp., et al., 633 S.E.2d 292 (WV 2006); product liability case VA resident against Ohio company filed in WV court
- ▶ Justice Larry Starcher (former asbestos trial judge) issued opinion stating that the "stream of interstate commerce" principle underlies court's analysis AND today's economy operates in a multi-jurisdictional manner.

“Backlog” Lung Cancer Mediation

- ▶ Mediation of 32 lung cancer cases in 1/14 (down from original 50)
- ▶ Filings date from 2002-2012—3 plaintiff firms
- ▶ Reportedly 450 cases ripe for inclusion
- ▶ Judge Wilson pre-mediation conference 10/11/13
 - ▶ Plaintiff Fact Sheet—not verified, inconsistent with pleadings, expert reports
 - ▶ Medical records and authorizations
 - ▶ Prior product/premises i.d. depositions to be made available by plaintiff—undiscovered sites?

Pennsylvania Update

Changes in Asbestos Legal Landscape

- ▶ Recent Decisions Impact Causation & *Every-Exposure* Theory
Betz and Howard/Ravert 9/26/13
 - ▶ Request for Frye Hearings
 - ▶ Summary Judgment more viable?
- ▶ Challenges to Worker's Compensation bar to liability

Recent Decisions Impacting Causation & Every-Exposure Theory

- ▶ Every-Exposure/Every-Fiber/Any-Exposure Theory
- ▶ “Each and every exposure to asbestos – no matter how small – contributes substantially to the development of asbestos-related diseases.”
- ▶ Dose responsive disease

Betz Opinion

- ▶ Pennsylvania Supreme Court's Discussion of *Every-Exposure Theory*
 - ▶ The trial court “reasonably questioned how it was – if all Dr. Maddox could say is that a risk attaches to a single asbestos fiber – that he could also say that such risk is *substantial* when the test plaintiffs may have been (and likely were) exposed to millions of other fibers from other sources including background exposure.”

Betz Opinion

- ▶ Pennsylvania Supreme Court's Discussion of *Every-Exposure* Theory
 - ▶ “Simply put, one cannot simultaneously maintain that a single fiber among millions is substantially causative, while also conceding that a disease is dose responsive.”

Subsequent Treatment of Betz

- ▶ Pennsylvania Supreme Court revisits Betz decision in Howard v. A.W. Chesterton, et al., PA Supreme Court, Eastern District, J-7A-C-2013, 48 EAP 2012, 49 EAP 2012, 50 EAP 2012 (*per curiam*).
 - ▶ Howard decided *September 26, 2013*
 - ▶ Betz decided May 23, 2012

Howard v. A.W. Chesterton, et al.

- ▶ Summary of Points

- ▶ “The theory that each and every exposure, no matter how small, is substantially causative of diseases **may not be relied upon** as a basis to establish substantial-factor causation for diseases that are dose-responsive.”

Howard v. A.W. Chesterton, et al.,

▶ Summary cont.

- ▶ “Relatedly, in cases involving dose-responsive diseases, expert witnesses may not ignore or refuse to consider dose as a factor in their opinions.”
- ▶ “Bare proof of some *de minimis* exposure to a defendant’s product is insufficient to establish substantial-factor causation for dose-responsive diseases.”

Howard v. A.W. Chesterton, et al.,

- ▶ Summary Cont.

- ▶ “Relative to the testimony of an expert witness addressing substantial-factor causation in a dose-responsive disease case, some reasoned, **individualized assessment** of a plaintiff’s or decedent’s exposure history is **necessary.**”

Howard v. A.W. Chesterton, et al.,

- ▶ Summary Cont.

- ▶ “Summary judgment is an available vehicle to address cases in which only bare *de minimis* exposure can be demonstrated and where the basis for the experts testimony concerning substantial-factor causation is the any-exposure theory.”

Frye Hearings and Novelty?

- ▶ Impact of Betz on Frye challenges
- ▶ Does Betz encourage Frye challenges?
- ▶ Increased use of Industrial Hygienists?
- ▶ Practical effect in varied jurisdictions?

Workers' Compensation Exclusivity Update

- ▶ Premise /Employer defendants in more cases
- ▶ Workers' compensation system is still generally a complete bar to personal injury actions, including asbestos—in PA and WV, but...
- ▶ Exceptions to traditional workers' compensation exclusivity

West Virginia

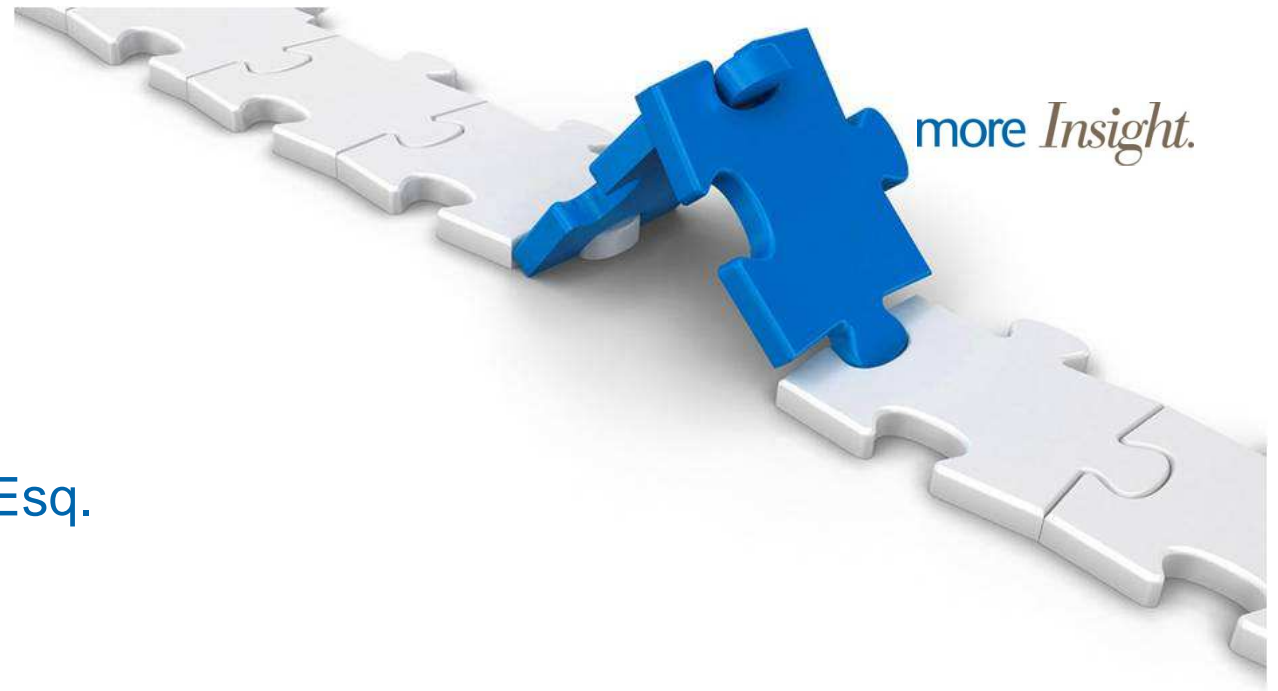
▶ “Deliberate Intent” causes of action

▶ WV Code 23-4-2

- ▶ Employer acted with deliberate intent (consciously) to cause injury or death to employee, OR
- ▶ Satisfy **all** of the 5 statutory elements:
 - ▶ 1. Specific unsafe condition, high risk, serious injury or death (could be lack of training/supervision by e'er);
 - ▶ 2. E'er actual knowledge of specific unsafe condition;
 - ▶ 3. Condition was a vio of a state or federal regulation;
 - ▶ 4. E'er nevertheless exposed e'ee to that condition; &
 - ▶ 5. E'ee suffered compensable injury/death from condition.

Pennsylvania

- ▶ No “Deliberate Intent” exception to PA WCA for employer liability
- ▶ Trend>>>*latent diseases* distinguishable?
 - ▶ Whether “disease manifestation” of “a latent occupational disease that is invariably noncompensable under the Act” is violative of PA constitution
 - ▶ Certified for appeal:
 - ▶ Landis v. A.W. Chesterton Co., 20 A.3d 1183 (2011)
 - ▶ Tooley v. AK Steel Corp., et al., 20 A.3d 1184 (2011)



Questions?

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