

New York Asbestos Litigation Update

By David Katzenstein

I. *Pomponi; Dyer; Grunert; and Olsen – The Appellate Division, First Department Interprets Nemeth*

Earlier this year, in *Nemeth v Brenntag N. Am.*, ___ NY3d ___, 2022 NY Slip Op 02769, 1 [2022] (<https://www.eckertseamans.com/legal-updates/francis-nemeth-v-brenntag-north-america-et-al>) the Court of Appeals (New York’s highest court) applied its holding from *Parker v Mobil Oil Corp.*, 7 NY3d 434, 448 [2006] to the asbestos litigation (albeit in a case involving a mesothelioma from exposure to talc alleged to be contaminated with asbestos) requiring a plaintiff’s expert to support their opinion with a “...scientific expression linking a [decedent’s] actual exposure to asbestos to a level known to cause mesothelioma.”. Notwithstanding, on May 8, 2022, Justice Silvera – the New York City Asbestos Litigation presiding judge – held in *Unger v Watts* (*unpublished* – copy of decision to be provided upon request) that a defendant is not entitled to summary judgment on a contested motion before him: i) unless the defendant proved its product could not have caused the plaintiff’s disease; and/or ii) as long as there was some contested issue of fact remaining for trial.

Before the *Nemeth* decision, based on both *Parker* and *Juni* – some defendants made and lost summary judgment motions when plaintiffs opposed the motions with nothing more than general allegations of their experts that asbestos causes mesothelioma. However, this week, in a series of decisions all announced at the same time, asbestos defendants in the NYCAL were offered a glimmer of hope. Specifically, The Appellate Division, First Department not only reversed three summary judgment denials, it also reversed and dismissed as a matter of New York law a \$105 million verdict previously sustained by the trial judge who denied defendant’s post-trial motion for a directed verdict. All four of the decisions (*Pomponi; Dyer; Grunert, and Olsen* – orders linked below) were brief, to-the-point, and held that *Nemeth* requires the dismissal of a plaintiff’s case where the plaintiff’s proofs do not include “a scientific expression linking a [decedent’s] actual exposure to asbestos to a level known to cause mesothelioma”. On their face, these decisions suggest that an asbestos defendant may prevail at summary judgment where its motion is supported with a scientifically sound/reliable and admissible scientific study, combined with an expert opinion that the measured doses of asbestos released from the defendant’s product is too small to be a cause of plaintiff’s mesothelioma.

It remains to be seen how NYCAL judges will ultimately apply the standard set forth in this series of decisions that is sure to result in extensive summary judgment motion practice focused on a defendant’s fiber/cc test and expert reports placing any respirable asbestos fiber release below an ambient exposure threshold. Further, defendants should expect plaintiffs to focus their oppositions on the holding in *Reid v Georgia Pacific* requiring moving parties “to unequivocally establish its product could not have contributed to the causation of plaintiff’s injury”.

II. New York Legislative Initiatives

Of substantial import in New York are two recent legislative initiatives relating to insurance disclosure and changing the standard for valuing wrongful death damages:

i. CPLR 3101(f) – Insurance Disclosure

In late 2021, the New York State Legislature passed CPLR3101(f), drastically expanding insurance disclosures for defendants engaged in litigation. (<https://www.eckertseamans.com/legal-updates/pennsylvania-asbestos-litigation-update-ny-senate-bill-7052-the-comprehensive-insurance-disclosure-act>). Since passing the law, both the plaintiffs and defense bars in NYCAL and Upstate New York undertook motions and briefs relating to the new law's applicability to the defendants involved in the asbestos litigation specifically. No court has ruled on the timing and scope of defendants' responses that may need to be filed and/or verified by defendants.

ii. Wrongful Death Damages

In June, the New York State Legislature passed a bill that will expand Wrongful Death Damages in a number of important ways – namely, by expanding compensable damages (which are currently limited to the monetary value of a defined set of services) to include loss of affection and companionship; and by permitting “close family members” to recover emotional damages. Further, the law also extends the statute of limitations for a wrongful death claim from 2 years to 3 ½ years. It is currently unclear if Gov. Hochul will sign or veto the bill; however, as currently drafted, if signed into law the statute will impact all pending cases.