FROM THE EDITOR

In an effort to increase dialogue about state court jurisprudence, the Federalist Society presents *State Court Docket Watch*. This newsletter is one component of the State Courts Project, presenting original research on state court jurisprudence and illustrating new trends and ground-breaking decisions in the state courts. These articles are meant to focus debate on the role of state courts in developing the common law, interpreting state constitutions and statutes, and scrutinizing legislative and executive action. We hope this resource will increase the legal community's interest in tracking state jurisprudential trends.

Readers are strongly encouraged to write us about noteworthy cases in their states which ought to be covered in future issues. Please send news and responses to past issues to Maureen Wagner, at maureen.wagner@fed-soc.org.

CASE IN FOCUS

Pennsylvania Supreme Court Excludes *Any Exposure* Theory in Asbestos and Toxic-Tort Litigation

by William L. Anderson & Kieran Tuckley

On May 23, 2012, the Pennsylvania Supreme Court issued a unanimous decision holding that the trial court had properly excluded the plaintiffs' expert witnesses from espousing the opinion that every occupational exposure to asbestos contributes substantially to mesothelioma.[1] This is the *any exposure* theory that has served as the foundation for a significant expansion of asbestos litigation in recent years by incorporating even the smallest amount of occupational exposure as a "substantial factor" in causing disease. This article provides background information on the *any exposure* theory and explains the significance of this ruling and why this and other courts are regularly rejecting it. The Pennsylvania opinion is only the latest in a series of similar opinions excluding the *any exposure* theory as unscientific and unsuitable to support causation in toxic tort litigation.

I. The *Any Exposure* Theory

The *any exposure* theory, as articulated by many plaintiffs' expert witnesses, typically states that each and every exposure to any kind of asbestos in an occupational setting that is above (or different from) background exposures is a substantial factor in causing disease.[2] Critically, these experts will testify that background fibers (those found in the ambient air) by an individual are not causative, even though they can contribute millions of fibers to a person's lungs over a lifetime. The experts who testify to the position decline to determine the levels of occupational asbestos to which a plaintiff may have been exposed or make any determination as to whether such levels are greater than the person's lifetime background exposures or would otherwise be sufficient to cause disease. They view the mere fact of occupational exposure as sufficient, thus creating a basis for liability for such miniscule exposures as removing gaskets, handling brake pads, or merely being in the presence of small amounts of asbestos in buildings.

As plaintiffs have pursued litigation against asbestos-manufacturing companies, the *any exposure* theory has become the basis for expanding litigation to even the most minor of exposures and products in which fibers are bound up in resins or plastics. The vast majority of courts addressing the admissibility or sufficiency of this theory, however, have rejected it.[3] Some asbestos jurisdictions do continue to permit experts to present this theory, and those and other experts have attempted in recent years to expand its use into other toxic-tort litigation.

II. Background of the Case

The *Betz* case arose in 2005 when the plaintiff, Charles Simikian, commenced a lawsuit against a number of defendants asserting that his exposure to asbestos caused his mesothelioma. Mr. Simikian was a brake mechanic who worked with asbestos-containing brake pads. In *Simikian*, however, the parties agreed that the trial court should review the viability of the *any exposure* theory generally without regard to specific case

facts. Thus, Mr. Simikian's particular exposures were not a focus so much as the notion that the *any exposure* theory could support causation regardless of the extent and nature of an individual plaintiff's claimed exposures. Plaintiffs asserted that under the *any exposure* theory, Mr. Simikian and anyone else who had even casual contacts with asbestos-containing products could claim that each such exposure was responsible for their disease.[4]

In response, the defendants filed motions challenging the admissibility of the *any exposure* theory under Pennsylvania's *Frye* standard on the grounds that it did not meet the standard of general acceptance in the relevant scientific community.[5] Judge Robert Colville of the Pennsylvania Superior Court for Allegheny County held a three-day hearing, after which he excluded this testimony.[6] Other courts have cited to and relied on Judge Colville's opinion as one of the best-articulated exposés of the logical holes and scientific flaws in the *any exposure* theory. In 2010, however, a majority of the intermediate court of appeals reversed Judge Colville's order.[7] The intermediate court held that Judge Colville had abused his discretion by analyzing the flaws in the theory himself, without citing to expert or briefing position articulating those same findings, and by rejecting the underpinnings of the theory as set forth by plaintiffs' expert.[8] The Pennsylvania Supreme Court accepted review and reversed the intermediate court, restoring Judge Colville's original decision.[9]

III. The Pennsylvania Supreme Court's Analysis

The Pennsylvania Supreme Court agreed with virtually all of the criticisms asserted by Judge Colville. The court agreed that Judge Colville was correct to challenge how the plaintiffs' expert could reason that even the smallest of occupational exposures could cause disease, yet the same type of fibers in the ambient air are not causative, regardless of overall lifetime dose.[10] The court noted that Dr. Maddox's reliance on case reports, animal studies, and regulatory pronouncements provided an unreliable basis for a causation opinion.[11] Further inconsistencies in the *any exposure* theory included Dr. Maddox's admission that individual exposures differ in the potency of fiber type, the concentration, or intensity of exposure, and the duration of the exposure. The *any exposure* theory fails to consider the different nature of these exposures, even though Dr. Maddox agreed that these factors "need to

... continued page 5

Texas Supreme Court Rules in Favor of Private-Property Owners in Case on Public Access to Beaches

by Brittany La Couture & Tim Sandefur

In a case of first impression, the Texas Supreme Court recently ruled in *Severance v. Paterson*[1] that the rights of private-property owners trump the public's right to access beaches on private property. The court held 5-3 that when an act of nature "suddenly and dramatically" pushes back the vegetation line on a beach, the public easement that state law creates on beaches does not move along with it.[2] In other words, while easements may change gradually, an avulsion[3] does not entitle the state to a drastic expansion of its claim over existing private property.[4] This article will describe the background and decision in *Severance* and examine how this case fits in with coastal-property jurisprudence.

I. Background

Texas's Open Beaches Act ("OBA") was passed in 1959 to help enforce the public's right to use the state's coastal beaches.[5] The OBA applies to state-owned beaches as well as to those where a public easement has been established over privately owned land.[6] Hurricane Rita, which hit the Texas coast in September 2005, washed away much of the public and private property burdened by these easements, and moved the line of vegetation landward over the property lines of owners whose Galveston Island lands were previously unencumbered.[7] The state sought to enforce the OBA easements against them and condemn homes that were now located on the beach.[8] The property owners sued in federal district court,[9] which held that the public easement automatically "rolls" from one parcel of land to the next according to natural changes in topography.[10] The case was appealed to the Fifth Circuit, which by certification asked the Texas Supreme Court in October 2011 to resolve whether easements under the OBA "rolled" with such sudden changes to the landscape.[11]

II. The Decision

The case was first brought before the federal district court, then appealed to the U.S Court of Appeals for the Fifth Circuit, which asked the Texas Supreme Court to determine whether Texas

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Endnotes

1 Citizens United v. Fed. Election Comm'n, 558 U.S. 50 (2010).

2 Adam Liptak, *Court Declines to Revisit Its* Citizens United *Decision*, N.Y. Times, June 25, 2012.

3 Am. Tradition P'ship, Inc. v. Bullock, No. 11A762 (U.S. 2012).

4 *Id.*

5 *Id.*

6 *Id.* ("Montana's arguments in support of the judgment below either were already rejected in *Citizens United*, or fail to meaningfully distinguish that case.").

7 Citizens United v. Fed. Election Comm'n, 558 U.S. 50 (2010).

8 *Am. Tradition P'ship*, No. 11A762.

9 *Id.*

10 *Id.*

11 *Supreme Court Reverses Anti-*Citizens United *Ruling From Montana*, Huffington Post, June 25, 2012.

Pennsylvania Supreme Court Excludes *Any Exposure* Theory in Asbestos and Toxic-Tort Litigation

Continued from page 3...

be considered in trying to estimate the relative effects of different exposures."[12] The court also took issue with Dr. Maddox's "extrapolation down" technique under which he relied on studies showing disease at high exposures to support his opinion that the same thing would occur at low exposures.[13]

The court ultimately concluded that the *any exposure* theory of Dr. Maddox was incompatible with causation rules under Pennsylvania law. The court explained that Dr. Maddox's *any exposure* theory is unable to support a finding of causation because "one cannot simultaneously maintain that a single fiber among millions is *substantially* causative, while also conceding that a disease is dose responsive."[14] The court described this position as a "fiction" that would subject defendants to full joint-and-several liability for injuries, even in cases where exposure to a defendant's product could be classified as minimal in relation to other exposures.[15] Because of the internal inconsistencies and large analytical gaps within Dr. Maddox's testimony, the court unanimously held that his opinion was unreliable and Judge Colville did not abuse his discretion in excluding these opinions during a *Frye* hearing.[16]

IV. The Significance of the Pennsylvania Decision

From a national perspective, the Pennsylvania Supreme Court joins a number of courts in holding that the *any exposure* theory is either inadmissible under rules regarding expert testimony, or insufficient to prove causation as a matter of law. The Supreme Court of Texas, the Sixth Circuit Court of Appeals, and an array of lower state and federal court decisions have concluded that the theory is not scientifically sound.[17] These decisions in some ways are not particularly novel, in that they require plaintiffs in asbestos cases only to prove what must be shown in any other toxic-tort case—that the plaintiff experienced a sufficient dose of a toxic substance to cause the alleged disease. They are significant, however, in rejecting the primary basis for assertion of causation in many, if not most, asbestos cases on dockets today.

Pennsylvania itself had in fact been something of a battleground state, due to the competing decisions of Judge Colville and several other trial judges who had rejected the theory, and the clashing decision of the intermediate court declaring it acceptable. The *Betz* decision is thus also critical for Pennsylvania asbestos and toxic-tort cases. Pennsylvania law is now clear—experts in key asbestos dockets such as Philadelphia can no longer claim that any asbestos exposure is enough for causation. The asbestos docket in Texas changed dramatically after that state's supreme court began requiring proof of dose and causation in the 2007 *Borg-Warner* opinion. If Pennsylvania trial courts apply the ruling accurately, the result will likely be a significant reduction in the Pennsylvania asbestos docket as well.

The issue continues to be litigated in other jurisdictions, including the United States Ninth Circuit Court of Appeals and Supreme Court of Virginia, both of which have *any exposure* cases pending. A growing number of non-asbestos cases have included assertions of this theory to support causation (e.g., benzene, diacetyl popcorn lung disease, dental cream cases, medical monitoring and groundwater cases), but to date the theory has not gained much traction in non-asbestos

toxic-tort cases. Presumably, the Pennsylvania opinion will make it more difficult to expand the theory into other areas as well.

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Endnotes

1 Betz v. Pneumo Abex LLC, No. 38 WAP 2020, 2012 WL 1860853 (Pa. May 23, 2012).

2 *Id.* at *2.

3 *See infra* Section IV. For a more thorough review of the *any exposure* theory, see Mark A. Behrens & William L. Anderson, *The 'Any Exposure' Theory: An Unsound Basis for Asbestos Causation and Expert Testimony*, 37 Sw. U. L. Rev. 479 (2008).

4 *In re* Toxic Substances Cases, No. A.D. 03-319, 2006 WL 2404008, at *1 (C.P. Allegheny, Aug 17, 2006).

5 *Id.* Pennsylvania has adopted the *Frye* standards for testing the validity of expert testimony. In short, Pennsylvania requires that an expert's methodology must be generally accepted within the relevant scientific field. *See* Grady v. Frito-Lay, Inc., 839 A.2d 1038 (Pa. 2003).

6 *Id.* at *2.

7 Betz v. Pneumo Abex LLC, 998 A.2d 962 (Pa. Super. 2010), *rev'd* No. 38 WAP 2020, 2012 WL 1860853 (Pa. May 23, 2012).

8 *Id.* at 976.

9 Betz v. Pneumo Abex LLC, No. 38 WAP 2020, 2012 WL 1860853 (Pa. May 23, 2012).

10 *Id.* at *22.

11 *Id.* at *23.

12 *Id.*

13 *Id.* at *25.

14 *Id.* at *23 (emphasis added).

15 *Id.* (citing Gregg v. V-J Auto Parts Co., 943 A.2d 216, 226-227 (Pa. 2007)).

16 *Id.* at *25.

17 *See, e.g.,* Moeller v. Garlock Sealing Techs., 660 F.3d 950 (6th Cir. 2011); Bartel v. John Crane, Inc., 316 F. Supp. 2d 603, 607-08 (N.D. Ohio 2004), *aff'd sub nom.* Lindstrom v. A-C Prod. Liab. Trust, 424 F.3d 488 (6th Cir. 2005); Borg-Warner Corp. v. Flores, 232 S.W.3d 765, 773 (Tex. 2007), *reh'g denied* (Oct. 12, 2007); Smith v. Kelly-Moore Paint Co., 307 S.W.3d 829 (Tex. App. 2010); Butler v. Union Carbide Corp., 712 S.E.2d 537 (Ga. Ct. App. 2011); Daly v. Arvinmeritor, Inc., No. 07-19211, 2009 WL 4662280 (Fla. Cir. Ct. Nov. 30, 2009); Free v. Ametek, No. 07-2-04091-9 SEA, 2008 WL 728387 (Wash. Super. Ct. Feb. 28, 2008).

Texas Supreme Court Rules in Favor of Private-Property Owners in Case on Public Access to Beaches

Continued from page 4...

Committee report, which stated that "[a]n easement is a property interest; the State can no more impress private property with an easement without compensating the owner of the property than it can build a highway across such land without paying the owner."[20]

The court explained that historically the State of Texas, and before that the Republic of Texas and Mexico, all recognized the beachfront properties on Galveston Island to be without limitation.[21] No subsequent action had altered this longstanding recognition of the owners' rights, proving that the "rolling easement" theory had not existed "since time immemorial."[22] And without such a pre-existing restriction on private property rights, the state would have to pay for property if it wanted to take it for public use.

IV. Implications

The *Severance* decision was greeted by loud complaints by government and environmental groups as an example of pro-business activism.[23] These critics pointed out that the decision differed sharply from similar cases in other states.[24] New Hampshire, New Jersey, Idaho, Hawaii, and Oregon state courts have all enforced public easements across privately owned beach property.[25] But the *Severance* majority pointed out that "[t]hese jurisdictions have long-standing restrictions inherent in titles to beach properties or historic customs that impress privately owned beach properties with public rights,"[26] which are not present in Texas.

The local effect of this ruling is that property owners must explicitly grant public-access easements before the state may operate publicly funded beach clean-up and renourishment programs on Galveston beaches.[27] While many homeowners' associations in the Galveston area have willingly granted easements in exchange for government aid in maintaining beaches, not all landowners are willing to trade away their right to exclude.[28] In fact, there is currently a debate about