of Community Affairs ("DCA"), according to the authority of the Reorganization Act.[7]

II. Appellate Court Decision

Following Governor Christie's executive order, the move to dissolve COAH was challenged by the Fair Share Housing Center, a housing advocacy group, which argued that because the agency was "in but not of" the executive branch, it was not subject to the Reorganization Act.[8]

The appellate court agreed with the Fair Share Housing Center, and held that the Reorganization Act did not apply to agencies which were "in but not of" the executive branch. The court considered the definition of "agency" under the Act, which includes: "[a]ny division, bureau, board, commission, agency, office, authority or institution of the executive branch created by law," and concluded that the absence of an express mention of "in but not of" agencies suggested an intent that they not be included.[9] The court also noted that COAH's enabling legislation as a whole represented "a carefully crafted statutory scheme" which, in the court's estimation, suggested that the Legislature would not likely have intended to subject the agency to the Reorganization Act.[10]

Finally, the court raised separation of powers concerns regarding the Reorganization Act. It noted that the initial decision upholding the constitutionality of the Act, *Brown v. Heymann*,[11] "relied primarily" on the fact that similar legislation had been upheld at the federal level. Interestingly, the court emphasized testimony by then-Assistant Attorney General Antonin Scalia, who had objected to the "legislative veto" in the federal law specifically because it would have allowed just one legislative house to block a reorganization plan. Since the New Jersey Act provided for a bicameral legislative veto, his concern presumably would not apply. Nevertheless, the court suggested that the subsequent amendments that excluded independent agencies from the federal law might call the application of the Reorganization Act to "in but not of" agencies into question.[12]

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Maryland Court of Appeals Limits Asbestos Liability

*By Michael J. Ellis**

For decades, asbestos cases have wound their way through state and federal courts. The first wave of cases, starting in the 1970s, was brought by construction workers and other plaintiffs who were directly exposed to asbestos.[1] Thousands of direct-exposure cases led to the bankruptcy of major asbestos-producing companies, including Johns-Mansville.[2] Thirty years later, most direct-exposure plaintiffs have obtained relief or died. That, you might think, would mean an end to asbestos lawsuits. And yet, litigation is alive and well, thanks to a second wave of lawsuits.[3] Many plaintiffs in this second wave allege that they were exposed to asbestos through the contaminated work clothing of spouses or family members.[4]

Georgia Pacific LLC v. Farrar was part of that second wave of "take-home" asbestos cases.[5] The plaintiff, Joyce Farrar, lived with her grandparents in Maryland in the 1960s. Her grandfather, a construction worker at a federal building in Washington, DC, in 1968 and 1969, did not use any asbestos products himself, but he spent time near drywall workers who used an asbestos-based Georgia-Pacific joint compound. As a teenager, Ms. Farrar shook out her grandfather's dust-covered work clothes, washed the clothes, and swept the dust from the laundry room floor. Forty years after laundering her grandfather's clothes, in 2008, Farrar was diagnosed with mesothelioma. She sued thirty defendants, including Georgia-Pacific, in Maryland state court, and a jury awarded her nearly $20 million.

Farrar presented the Maryland Court of Appeals, the Free State's highest court, with two questions: (1) whether Georgia-Pacific owed a duty to warn the family members of workers who came into contact with its products about the dangers of asbestos and (2) whether Farrar presented sufficient evidence that Georgia-Pacific's products caused her mesothelioma. Unanimously finding the answer to the first question to be no, the court did not answer the second.

The Maryland court's holding was in some respects unremarkable. Based on the Second Restatement of Torts, *Farrar* reasoned that "[a] manufacturer cannot warn of dangers that were not known to it or knowable in light of the generally recognized and prevailing scientific and

technical knowledge available at the time of manufacture and distribution."[6] Some state courts before *Farrar* had ruled that manufacturers owed a duty to family members of asbestos workers.[7] In this light, the Maryland decision represents a significant step to limit future "take-home" asbestos claims.

Farrar found that, based on the state of scientific research in the late 1960s, Georgia-Pacific could not have known that asbestos-contaminated clothing could harm workers' families. A few studies in the 1960s suggested exposure to dust that traveled home on the workers' clothes could cause health problems, but OSHA did not require employers to provide changing rooms and specialized clothing for asbestos workers until 1972. Even though it was "in hindsight perhaps fairly inferable" that asbestos dust could harm workers' families, that inference was not enough to impose a duty. [8] In other words, the uncertain state of science about secondhand asbestos exposure prior to the 1972 OSHA regulations made it unforeseeable to Georgia-Pacific that family members like Joyce Farrar who never stepped foot on a construction site could suffer harms from its products.

Foreseeability was not, however, the only element of *Farrar*'s duty analysis. The court further held that whether Georgia-Pacific had a duty to warn family members depended on whether any warnings would have been feasible and effective. Because OSHA did not issue regulations on changing rooms for asbestos workers until 1972, even if Georgia-Pacific had told its customers—builders and manufacturers—about the dangers of asbestos dust exposure, nothing guaranteed those middlemen would have passed that warning along to asbestos workers, let alone to members of their families. Thus, "even if Georgia-Pacific should have foreseen back in 1968–69 that individuals such as Ms. Farrar were in a zone of dangers, there was no practical way that any warning . . . could have avoided that danger."[9]

Feasibility and foreseeability make for unusual bedfellows. Earlier Maryland cases suggest that whether a defendant's warning would have been effective is an element of proximate cause, not foreseeability.[10] And Maryland is not alone. In the famous *Palsgraf* case, for instance, the dissent by Judge Andrews argued that proximate cause means "the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics."[11] Judge Cardozo's majority opinion, on the other hand, eschewed the practical considerations of proximate cause in favor of foreseeability.[12] *Farrar*'s addition of feasibility to foreseeability blends the two sides of the *Palsgraf* debate into an uneasy compromise.

Because the Maryland court decided *Farrar* on duty alone, it avoided the second question before it: whether Farrar presented sufficient evidence that Georgia-Pacific's products caused her mesothelioma. Causation, a factual question for the jury, might have been a nettlesome issue for the court because Georgia-Pacific argued strenuously that the verdict below rested on questionable grounds.[13] Farrar's grandfather had worked at the federal building for several months, but he also installed asbestos insulation and cement for much of his fifty-year career as a construction worker—insulation and cement that Georgia-Pacific did not manufacture.[14] The jury nevertheless found that Georgia-Pacific's drywall joint compound, rather than any other manufacturer's product, was the proximate cause of Farrar's mesothelioma. Foreseeability, even when modified with feasibility, by contrast, was a purely legal question that did not require the Court of Appeals to overturn a jury verdict.

In sum, *Farrar* represents a significant step to limit asbestos liability. Maryland courts will be less likely to impose a duty on manufacturers with respect to third-party bystanders, especially when the scientific evidence of a product's harmfulness is less than certain. Even if harm is foreseeable, manufacturers may not be liable if they can show it would not have been possible to issue an effective warning.

**Michael J. Ellis is counsel to the U.S. House Permanent Select Committee on Intelligence. This article represents his views only and not the view of the Committee.*

Endnotes

1 *See* Mark A. Behrens, *What's New in Asbestos Litigation?*, 28 Rev. Litig. 500, 528 (2009).

2 *Id.* at 502–03

3 *Id.* at 545–46.

4 *Id.*

5 ___ A.3d ___, No. 102, Sept. Term 2012, 2013 WL 3456573 (Md. Jul. 8, 2013).

6 *Farrar*, 2013 WL 3456573, at *7; *see also* Martin v. Cincinnati Gas & Elec. Co., 561 F.3d 439, 447 (6th Cir. 2009) (rejecting take-home liability under Kentucky law); Holdampf v. A.C. & S. (*In re* N.Y. City Asbestos Litig.), 840 N.E.2d 115, 116 (N.Y. 2005) (same under New York law); Riedel v. ICI Ams., Inc., 968 A.2d 17, 25– 26 (Del. 2009) (same under Delaware law). *See generally* Restatement (Second) of Torts § 402A cmt. k (1965) (explaining that the seller of an "unavoidably unsafe" product is "not to be held to strict liability for unfortunate consequences attending [its] use, merely because he has undertaken to supply the public with an apparently useful and

desirable product, attended with a known but apparently reasonable risk").

7 *See, e.g.*, Olivo v. Owens-Ill., Inc., 895 A.2d 1143, 1149 (N.J. 2006); Satterfield v. Breeding Insulation, Inc., 266 S.W.3d 347, 374 (Tenn. 2008).

8 *Farrar*, 2013 WL 3456573, at *13.

9 *Id.* at *10.

10 *See* Eagle-Picher Indus., Inc. v. Balbos, 604 A.2d 445, 469 (Md. 1992); Anchor Packing Co. v. Grimshaw, 692 A.2d 5, 35 (Md. Ct. Spec. App. 1997), *vacated on other grounds sub nom.* Porter Hayden Co. v. Bullinger, 713 A.2d 962 (Md. 1998).

11 Palsgraf v. Long Island R.R., 162 N.E. 99, 103 (N.Y. 1928) (Andrews, J., dissenting).

12 *Id.* at 101 (Cardozo, J.).

13 *See* Georgia-Pacific Br., *Farrar*, 2013 WL 3456573, at *33–34.

14 *Id.* at *3.

Florida Supreme Court Finds That the Sixth Amendment Right to Counsel Allows Withdrawal of Public Defenders from Criminal Cases

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Wainwright,[16] criminal defendants "are guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution."[17] Florida also guarantees this right under Article I, section 16 of the Florida Constitution.[18] The majority reaffirmed that the right to effective assistance of counsel "encompasses the right to representation free from actual conflict"[19] and that, furthermore, an "actual conflict of interest that adversely affects a lawyer's performance violates a defendant's Sixth Amendment right to effective assistance of counsel."[20]

To address the issue, the Court first reviewed the historical evidence of the public defender's budget reductions and increased caseload assignments. The Court noted that the Eleventh Judicial Circuit Office of the Public Defender routinely assigned approximately "400 cases per attorney for a number of years" and that third degree "felony attorneys often have as many as fifty cases set for trial in one week," and yet most professional legal organizations recommended caseloads of "200 to 300 [or] less."[21]

The Court found that excessive caseloads result in an inability "to interview clients, conduct investigations, take depositions, prepare mitigation, or counsel clients about pleas."[22]

The Court noted that the United States Supreme Court recently issued two decisions addressing ineffective assistance of counsel in pre-trial matters and plea agreements in *Lafler v. Cooper*[23] and *Missouri v. Frye*.[24] These cases determined that ineffective pre-trial representation was just as critically important as representation at trial, as most criminal cases conclude in plea agreements.[25]

Next, the court turned to the statutory language governing withdrawal by the public defender based on conflicts. The Florida Legislature enacted statutory language in 1999, which required a trial court to review motions to withdraw from the public defender and determine whether an asserted conflict is prejudicial to an indigent client.[26] In 2004, the Legislature added the Section 27.5303(1)(d) requirement (which was challenged constitutionally in *Bowens*) that "[i]n no case shall the court approve a withdrawal by the public defender based solely upon inadequacy of funding or excess workload of the public defender."[27]

Ultimately, the court decided that "section 27.5303 should not be interpreted to proscribe courts from considering or granting motions for prospective withdrawal when necessary to safeguard the constitutional rights of indigent defendants to have competent representation."[28] The Court concluded that the prejudice required for withdrawal under the statute, when it is based on an excessive caseload, is a showing of "'a substantial risk that the representation of [one] or more clients will be materially limited by the lawyer's responsibilities to another client'" under the relevant provisions of Florida Bar Rules.[29]

The Court found that the statute to be facially constitutional. However, the Court noted that the statute "should not be applied to preclude a public defender from filing a motion to withdraw based on excessive caseload or underfunding that would result in ineffective representation of indigent defendants nor to preclude a trial court from granting a motion to withdraw under those circumstances."[30] Significantly, the Court found that pursuant to the doctrine of inherent judicial power, it is the sole province of the judicial branch to regulate issues of ethical representation and conflicts of interest, and that this doctrine is most compelling when safeguarding fundamental rights.[31]