Asbestos Litigation

January 2019 Asbestos Litigation Update

As 2019 begins, we at Walsworth are pleased to provide you with an update on the status of claims, local and national trends, and recent case law impacting asbestos litigation over the past year.

Volume of Asbestos Cases and Overall Filing Trends

- San Francisco Superior Court

In 2018, filings were slightly up from the past three years. Asbestos-related filings in San Francisco Superior Court through November 2018 totaled 103 (up from 93 in 2017), including 9 mesothelioma, 17 lung cancer, 58 asbestosis, and 19 "other cancer" matters.

- Alameda Superior Court

Through the end of November 2018, there were a total of 55 asbestos-related filings, including 1 asbestosis, 5 lung cancer, and 49 mesothelioma. The 2018 numbers were 13 less than 2017's, which may be due to the slightly higher numbers in San Francisco.

- Solano Superior Court

In Solano County Superior Court, filings dropped to 6 cases, including 1 asbestosis claim, 4 mesothelioma claims, and 1 lung cancer matter filed through the end of November 2018.

- Los Angeles Superior Court

In Los Angeles Superior Court, 116 asbestos-related matters were filed through the end of November 2018. Cases involving malignancies continue to be more numerous than those involving asbestosis.

- Other Southern California Superior Courts

In Ventura Superior Court, 4 asbestos-related cases were filed. We are not aware of any cases filed in other jurisdictions.

Hon. David S. Cunningham Assigned as New Southern California Coordinated Cases Presiding Judge

Earlier this year, Judge Brian Currey was assigned as the presiding judge over all complex matters in Los Angeles. However, shortly after his assignment, he was called to sit *pro tem* on the Second District Court of Appeal, and in late November he was permanently elevated to the Court of Appeal. In his absence, Judge John Kralik and Judge Rupert Byrdsong filled in as the temporary presiding judges over coordinated cases. As a result of Judge Currey's temporary and then permanent assignment, a new presiding judge for all coordinated matters was assigned. Both sides exercised preemptory challenges to the judges. In December, the defense challenged Judge Michelle Court, and more recently plaintiffs challenged Judge Stephanie Bowick. On January 18, 2019, Department 15 assigned Judge David Cunningham to be presiding judge.

We anticipate we will know more about Judge Cunningham and what to expect in the next few weeks, and we will provide a further update on the new judge at that time.

Courtroom Congestion in Northern and Southern California

We continue to see congestion in courts across the state, which has led to multiple trial continuances. San Francisco has resumed the practice of coordinating cases that are similar in alleged disease, or will continue matters numerous times until the

statute of limitations is about to run. Los Angeles has attempted to alleviate some of the pressures on the trial courts by requiring significant trial document workup prior to the matter being assigned to a trial courtroom. In Los Angeles, unlike in the past when the Final Status Conference was held the same day as trial, the Final Status Conference hearing is now generally set between one and two weeks prior to trial, depending on whether the matter has a preferential trial date. The stated goal by Department One of Los Angeles Superior Court is that all trial documents will be ruled upon and the case ready to begin as soon as the matter is assigned out. Thus, the presiding judge must rule on all motions in limine and page and line designations prior to the matter being deemed ready for trial. Further, the parties must meet and confer in advance of the Final Status Conference to discuss all trial documents and joint submissions, including jury instructions, trial schedules, and verdict forms. This approach has forced trial counsel to get involved earlier, with the expectation that both sides will review the strengths and weaknesses of their case prior to calling a jury. Though this has eliminated some congestion, there are still multiple continuances of the Final Status Conference, especially in non-preference cases, prior to the matter being deemed ready for trial. Even if ready, a trial may be continued a number of times due to unavailability of courtrooms. While there may be some difficulty finding an available trial department for a preference case, those continuances, in general, are limited to just a few days depending on completion of trial documents and availability of courtrooms.

Trends Associated With San Francisco Asbestos Department Judge, the Honorable Cynthia Ming-mei Lee

Last June, Judge Lee was successfully reelected as a San Francisco Superior Court judge. Consequently, she continues in her role as presiding judge in the Asbestos/CEQA Department. Trial department availability and the backlog of asbestos cases remain the primary challenges facing Judge Lee in her administration of the complex civil litigation docket. While the mandatory settlement conference procedure has not changed since our previous updates, Judge Lee has increasingly used two other methods for managing her docket: denial of non-medically based motions for preference and case consolidation.

- Appellate Review of Judge Lee's Denials of Motions for Preference

As reported previously, Judge Lee has been holding plaintiffs to a more exacting standard when they move the court for a preferential trial date that is based on age (*Code of Civil Procedure* ("C.C.P.") section 36(a)) as opposed to clear and convincing medical documentation (C.C.P. section 36(d)). However, the Brayton firm has actively challenged Judge Lee's denials of C.C.P. section 36(a) motions for preference, starting with *Fox v. Superior Court* (2018) 21 Cal.App.5th 529. In *Fox*, Brayton sought a writ of mandate from the First District Court of Appeal compelling Judge Lee to grant their motion for trial preference. After reviewing the petition, opposition, and supporting documents, the First District ordered Judge Lee to vacate her previous order, and to grant a new order setting a preferential trial date within 120 days. In clarifying the standard for granting a preferential trial setting under C.C.P. section 36(a), the *Fox* court held that an attorney's declaration "based upon information and belief as to the medical diagnosis and prognosis of any party" (here plaintiff Ardella Fox) is sufficient (*Id.* at 534). In providing guidance as to establishing the second prong of C.C.P. section 36(a) – the health of the party is such that "…preference is necessary to prevent prejudicing the party's interest" in the case – the *Fox* court ruled that plaintiffs did not have to show that a party "might die before trial or become so disabled that she might as well be absent," since that was setting the standard too high (*Id.* at 534).

Recently, in *Foster v. Crane Co.*, SFSC Case No. CGC-18-276657, the Brayton firm moved for a C.C.P. section 36(a) preferential trial date that Judge Lee denied. Brayton brought a similar writ of mandate, as was done in *Fox*, and the First District issued an alternative writ requiring Judge Lee to either set aside her order denying the motion for preference or show cause why the writ should not be granted. Faced with this choice, Judge Lee (through Judge Wong, who was temporarily presiding) chose to adopt the tentative ruling to set aside and vacate her original order denying preference.

Clearly, the writs brought by the Brayton firm have had an impact upon Judge Lee with regard to how she will analyze C.C.P. section 36(a) cases in the future. However, it is still too early to tell whether she will grant them outright going forward, or deny future motions where the elder plaintiff appears healthy as compared with the plaintiff in *Fox* (Stage IV lung cancer, severe coronary artery disease, undergoing chemotherapy, etc.).

- Case Consolidation

Judge Lee has resurrected case consolidation as a means by which to deal with the asbestos backlog in San Francisco. Used years ago when the number of asbestos cases was much larger, case consolidation fell into disuse more recently when case filings declined. However, with statewide budget cuts causing (among other things) criminal cases to be tried in civil courts, Judge Lee has resorted to case consolidation as a means by which to group together "similar" asbestos cases for trial. The most recent consolidation was done last October, when Judge Lee assigned 15 living asbestosis cases to Judge Lynn O'Malley Taylor for trial. In balancing judicial economy with undue prejudice/jury confusion under *Code of Civil Procedure* section 1048(a), courts have generally adopted the *Malcolm* factors to determine if enough common questions of law and fact exist to justify consolidation. These factors include (1) common worksites, (2) similar occupations, (3) similar times/dates of exposure, (4) types of disease, (5) whether injured plaintiffs are living or deceased, (6) discovery status of each case, (7) whether plaintiffs have the same counsel, and (8) types of cancer alleged. (*Malcolm v. National Gypsum Co.* (2nd Cir. 1993) 995 F.2d 346, 350-351).

In order to avoid potential appellate challenges, Judge Lee selected Brayton disputed asbestotics, since they satisfied three of the eight *Malcolm* factors. Suffice it to say, Judge O'Malley Taylor denied the defendants' oppositions to consolidation. As a practical matter, we will likely see Judge Lee continue to use case consolidation throughout 2019 as an option for Brayton non-malignancies. However, what remains an open question is whether Judge Lee will attempt to consolidate malignancies – most likely wrongful deaths – since this would raise the stakes for possible appellate review and reversal.

Trends Associated With Alameda Asbestos Department Judge, the Honorable Brad Seligman

In Alameda, Judge Brad Seligman remains as the presiding judge over the Civil Complex/Asbestos Department. In January 2016, the Civil Complex and Asbestos departments were merged, with Judge Seligman becoming the supervising judge. From that time, all asbestos cases were assigned to either Judge Seligman, Judge Winifred Smith, or Judge George Hernandez, with Judge Evelio Grillo acting as the mandatory settlement conference judge. In general, this arrangement acted as a much-needed stabilizing force for Judge Seligman to manage a consolidated department of complex cases. In January 2018, Judge Ioana Petrou replaced Judge Hernandez as the third judge for asbestos assignment. At the same time, Judge Grillo stepped down as the asbestos settlement judge. This began a steady erosion of the "three judge" trial assignment system during 2018, culminating last month with Judge Petrou being elevated to the First District Court of Appeal and the majority of Judge Smith's asbestos docket being reassigned to other Alameda Superior Court judges, including Judge Grillo, Judge Dennis Hayashi, Judge Stephen Kaus, Judge Michael Markman, and Judge Robert McGuiness.

Ironically, the two biggest developments during 2018 occurred after Judge Grillo stopped presiding over the settlement conferences: the revamping of the mandatory settlement conferences and the proposal for early mediation.

Alameda County Superior Court Asbestos Mandatory Settlement Conference Proposal

In the past year, the Alameda County Superior Court has taken a strict approach to mandatory settlement conferences ("MSC"), ordering all parties to appear for settlement conference, including a representative from each insurance company on the risk, a representative of the insured, a settlement attorney, and a trial attorney. If a representative of each of these categories was not present at MSC, an order to show cause for sanctions was issued. Only in very rare situations was relief granted. Further, the parties were required to appear with "authority up to the amount of the demand." This action was taken as a result of the court's concern that too many cases were reaching the trial stage without meaningful settlement discussions taking place. However, after several MSC sessions and at great cost to defendants, it soon became clear that this method was not sustainable.

In response, the court asked each side to submit proposals to modify the MSC process and held an informal "brown bag" lunch in November, where parties were invited to roundtable ideas for a solution. We believe the meeting was fruitful, and it has resulted in a series of follow-up discussions including members of the insurance community and representatives from both the plaintiff's and defense bar.

Although no clear guidelines have been established to date, we do believe the court will ultimately order some type of private mediation in those cases where it is deemed appropriate. Preferably, this mediation would occur early in the litigation – with both sides required to participate in the cost – along with a follow-up MSC closer to trial. The parties are also working on softening the tone of the MSC order, particularly the order for all interested parties to appear with "authority up to the amount of the demand." Instead, language such as "each party must have in personal attendance persons with full authority to settle the case" is being proposed so that some flexibility can be allowed, not only for the amount of authority required, but also for the representatives in attendance. Discussions for a new MSC proposal are still in their infancy, and we anticipate many changes along the way. Some pretty big hurdles remain in reaching an agreement, particularly in regard to the cost of the mediation and suitable candidates for mediator. We will continue to keep you apprised throughout the year as the rules for MSC become more clear.

Bristol-Meyers Squibb Personal Jurisdiction Update

In 2018, we were successful in obtaining two significant decisions that favorably applied the holding in *Bristol-Myers Squibb Co. v. Superior Court* (2017) 137 S. Ct. 1773. In *Aveggio v. Advance Auto Parts, Inc.,* SFSC Case No. CGC-17-276612, Judge Lee granted the motion of defendant Viking Pump, Inc., to quash for lack of personal jurisdiction by applying the holding and principles in *Bristol-Myers* for the first time in a San Francisco asbestos case. The plaintiffs did not appeal.

In Alameda, Judge Petrou also granted a personal jurisdiction motion for defendant Edward Orton Jr. Ceramic Foundation in *Watts v. Ashby Lumber Company*, ACSC Case No. RG17873335. Like Judge Lee in *Aveggio*, Judge Petrou ruled for the first time in Alameda that the *Bristol-Myers* decision is not limited to the facts of that case (non-resident plaintiffs forming a class action), but has general application to all plaintiffs seeking to establish personal jurisdiction over a non-resident defendant. In addition, as Judge Lee did in *Aveggio*, Judge Petrou adopted our view of California law that the initial burden of proof is upon *plaintiffs* to show by admissible evidence that personal jurisdiction over a non-resident defendant is constitutional.

However, Judge Petrou went even further than Judge Lee by holding that the court is not bound to accept as true the sworn testimony of a witness in the form of a declaration. Rather, the court must "form its own independent conclusions" as to whether a plaintiff has "submitted probative evidence of specific jurisdictional facts." In other words, unlike the situation where judges accept as true whatever is said in a declaration in opposition to a motion for summary judgment, Judge Petrou has ruled that a California judge is not bound by that limitation in a personal jurisdiction setting: the court is free to weigh the credibility of a declarant or testifying witness. Although a notice to appeal Judge Petrou's decision was filed, the plaintiffs in *Watts* reconsidered and withdrew it.

Therefore, both San Francisco and Alameda have rendered opinions that lay an important foundation for all future jurisdictional challenges and can be used as persuasive authority for other jurisdictions to adopt. Los Angeles has stayed fairly consistent regarding its rulings on personal jurisdiction motions – granting most where there is no showing of the claimed asbestos exposure during the period at issue. However, with a new presiding judge set to take the bench in the next few weeks, it is possible that there may be a change in this trend.

Asbestos-Contaminated Talc Claims Update

- In the News

Reuters published a story on December 14 on the efforts of Johnson & Johnson to hide evidence of asbestos "contamination" in its baby powder products. The article cites many of the source documents used by plaintiff experts against defendants in the talc litigation. The article went viral during the weekend of December 15 and 16, headlining national and local news shows as well as social media. Below are links to the story and the CNBC interview of its author, Lisa Girion.

https://www.reuters.com/investigates/special-report/johnsonandjohnson-cancer/

https://www.cnbc.com/video/2018/12/14/reuters-lisa-girion-details-her-report-on-johnson-johnson-baby-powder.html

The value of Johnson & Johnson stock fell approximately 10 percent after publication of the articles, a downward adjustment of about $45 billion.

Johnson & Johnson's Chairman and CEO Alex Gorsky appeared with CNBC's Jim Cramer on December 17 and cited independent studies which showed there was "no causation between talc, baby powder, and ovarian cancer or any type of asbestos-related disease."

The full article and video can be seen at: https://www.cnbc.com/2018/12/17/johnson--johnson-ceo-denies-reports-about-asbestos-in-baby-powder.html

That same day, plaintiff's attorney Mark Lanier also called into a CNBC morning show. Lanier said that the large stock drop helped him get J&J's attention, which he hoped would force them to resolve the many lawsuits against them. His point was that company leadership should make the business decision not to fight but to settle.

The article and telephone interview can be seen at: https://www.cnbc.com/2018/12/18/attorney-behind-huge-talc-verdict-jnj-stock-drop-serves-my-purposes.html

The talc controversy, lawsuits and the alleged corporate conduct of Johnson & Johnson are now reaching the public realm without any context or balanced information. Consequently, the increasing "content" being put forward in the media about the purported dangers of talcum powder will continue to negatively condition potential jurors, not only here in California but nationwide, as the number of talc suits are on the rise heading into 2019.

- Los Angeles

In May 2018, a Los Angeles jury returned a verdict against Johnson & Johnson for $25.75 million for a 68-year-old woman who contracted pleural mesothelioma after years of using Johnson & Johnson

Baby Powder, on her children and while bowling. The jury awarded $21.7 million in compensatory damages to Joanne Anderson after finding Johnson & Johnson 67 percent liable for her mesothelioma. The jury also awarded $4 million in punitive damages.

Joanne Anderson v. Borg-Warner Corporation, et al., LASC Case No. BC666513, is the third cosmetic talc verdict that the plaintiff firm, Simon Greenstone, has obtained in Los Angeles. In 2015, Colgate-Palmolive was hit with a $13 million verdict for its Cashmere Bouquet product in *Winkel v. Calaveras Asbestos Ltd., et al.*, LASC Case No. BC549253. In 2016, another Los Angeles jury awarded Philip Depoian $18 million against talc supplier Whittaker Clark & Daniels in *Depoian v. American International Industries, et al.*, LASC Case No. BC607192.

- Alameda

In *Teresa Leavitt v. Johnson & Johnson, et al.*, ACSC Case No. RG17882401, the Kazan firm is proceeding with the first cosmetic talc trial in Alameda County. With Judge Brad Seligman presiding, this trial is the first being conducted after Reuters published its special report last December alleging the presence of asbestos in Johnson & Johnson products, along with the claim that the company attempted to hide that knowledge. The remaining defendants in this case are Johnson & Johnson and Imerys Talc America.

Born in the Philippines, Ms. Leavitt was diagnosed with mesothelioma in 2017. Leavitt is claiming that she was exposed to Johnson & Johnson talc that was sourced from mines in South Korea during her first two years of life, before her parents moved to the United States in 1968. According to plaintiffs, both the Korean-sourced talc and the talc from U.S. sources to which she was subsequently exposed have tested positive for asbestos. Both Johnson & Johnson and Imerys are expected to argue that the testing has only revealed non-asbestiform, which cannot cause mesothelioma.

- Solano

In late January, the Shingler firm is expected to go forward with another Johnson & Johnson talc case venued in Solano County (approximately 50 miles northeast of San Francisco). The case is being tried before Judge D. Scott Daniels. The remaining defendants are Johnson & Johnson and Imerys Talc America.

In *Joseph Woon-Shing Lee v. A.W. Chesterton Company, et al.*, Solano Case No. FCS050176, the plaintiffs will be arguing that Mr. Lee contracted mesothelioma while working as a grid caster for lead battery manufacturers, where he used Johnson & Johnson Baby Powder to dust the molds used in order to avoid sticking. According to plaintiffs, Lee's various employers had Johnson & Johnson talc in stock for this purpose. In addition to arguing that Johnson & Johnson talc did not contain asbestos, both Johnson & Johnson and Imerys are expected to point to Lee's earlier career as a marine carpenter onboard various steamships as the cause of his mesothelioma.

Please feel free to contact Peter Renstrom, Ingrid Campagne or Elizabeth Huynh for any further information.

Supreme Court to Decide "Bare Metal" Liability

On October 10, 2018, the Supreme Court heard oral argument in the case of *Air & Liquid Systems Corp., et al. v. Devries, et al.*, No. 17-1104, on a significant issue in asbestos litigation – the bare metal defense. The bare metal defense asserts that a manufacturer of products composed of only metal, and no asbestos components, has no liability for asbestos-containing components later utilized in or on its products. In a consolidated appeal from summary judgment awarded in two cases in the District Court of the Eastern District of Pennsylvania ("District Court"), the Third Circuit ruled that bare metal defendants do have liability for injuries that were reasonably foreseeable. The Sixth Circuit, however, has previously ruled that bare metal defendants do not have liability.

The underlying cases in the consolidated appeal arose from two matters, *DeVries v. General Electric Co., et al.*, and *McAfee v. 20th Century Grove Corp. of Texas, et al.*, arising out of the Third Circuit.

The *DeVries* matter involved a plaintiff who alleged exposure to asbestos while serving as an engineer aboard the U.S.S. TURNER from 1957 to 1960. A number of defendants moved for summary judgment while the case was pending in the District Court based on the bare metal defense. The District Court determined that maritime law applied, which recognizes the bare metal defense, and granted defendants' motions. The *McAfee* matter involved a plaintiff who alleged exposure to asbestos while serving as a merchant marine aboard the U.S.S. WANAMASSA and the U.S.S. COMMODORE in the 1970s. A defendant supplier of compressors moved for summary judgment under the bare metal defense, and the motion was granted by the District Court.

The Third Circuit reversed and remanded the District Court's ruling granting the defendants' summary judgment motions under the bare metal defense with regard to the negligence claims, so that the District Court could apply a fact-based test to determine liability. In its opinion, the Third Circuit noted that some courts apply a bright line rule that manufacturers cannot be held liable for products or components they did not manufacture, while other courts apply a fact-specific standard that asks whether the facts of the case made it foreseeable that hazardous asbestos materials would be used. The Third Circuit surveyed the principles of maritime law for guidance in issuing a ruling, and ultimately held that a bare metal manufacturer may be subject to liability if, at the time the manufacturer placed its product into the stream of commerce, it reasonably could have known that asbestos is hazardous and its product would be used with an asbestos-containing part, because (a) the product was originally equipped with the asbestos part, which needs to be replaced, (b) the manufacturer specifically directed that the product be used with the asbestos-containing part, or (c) the product required the asbestos-containing part to properly function.

With this ruling, the Third Circuit's opinion created a circuit split with the Sixth Circuit's opinion in *Lindstrom v. A-C Product Liability Trust* (2005) 424 F.3d 488. In *Lindstrom*, the plaintiff served aboard numerous vessels as a merchant seaman engineer and developed mesothelioma. He brought suit against various defendants under both products liability and negligence. The Sixth Circuit affirmed the District Court's granting of defendants' summary judgment motions based on the bare metal defense, and held that a defendant cannot be held responsible for asbestos-containing material that was incorporated into its product post-manufacture, and that a defendant cannot be held responsible for material attached or connected to its product on a claim of a manufacturing defect.

The Supreme Court is expected to make a decision sometime this term, and in doing so will determine whether the Third Circuit's interpretation of maritime law and bare metal manufacturer liability should be upheld. Given the limited scope of the appeal, i.e., whether the bare metal defense applies to negligence claims in the context of maritime law, the Supreme Court is likely to issue a limited ruling. However, a ruling in favor of the bare metal defense would be good news for defendants in asbestos cases, and could be widely cited as persuasive authority in cases beyond maritime law.

Misnomer of "Automatic Stay" Under California Code of Civil Procedure Section 916(a)

The recent case of *Marteney v. Elementis Chemicals* (2018) 28 Cal.App.5th 862 serves as a good reminder that a stay pending appeal under *Code of Civil Procedure* section 916(a) is not necessarily automatic, as the trial court retains jurisdiction to resolve any issues that do not implicate the merits of what is up on appeal. As in *Marteney*, the trial court can retain jurisdiction over awards of affirmative

relief.

Section 916(a) broadly states that an appeal stays "proceedings in the trial court upon the judgment or order appealed from or upon matters embraced therein." However, it also states that the trial court may proceed "upon any matter embraced in the action and not affected by the judgment or order." Thus, a determination of whether a trial court proceeding is "affected" by the appeal is determined on a case-by-case basis.

In the *Marteney* case, Marty and Marie Marteney filed a personal injury action for asbestos-related injury and recovered approximately $1.5 million against the remaining defendants Union Carbide Corporation ("UCC") and Elementis Chemicals, Inc. ("Elementis"). The judgment went up on appeal and Mr. Marteney died during the pending appeal. Mrs. Marteney and the heirs filed an amended complaint for wrongful death. After the Court of Appeal affirmed the judgment in the personal injury action, Mrs. Marteney dismissed her wrongful death claim from the amended complaint and settled with UCC. The case then proceeded to a damages-only trial on the wrongful death claims of the estate and the heirs as against Elementis. The jury found in favor of the estate and heirs and returned a damages verdict against Elementis. Further, the trial court held that, since Elementis could not show that the heirs had knowingly received any of the settlement proceeds, the heirs were not bound by the settlement agreements and Elementis was not entitled to offset any of the prior settlements against the judgment in the heirs' favor.

Elementis moved to vacate the judgment under California *Code Civil Procedure* section 473(d) on the grounds that the appeal from the earlier judgment triggered an automatic stay divesting the trial court of any jurisdiction related to the amended complaint. The trial court denied the motion on the grounds that the amended complaint did not impact the effectiveness of the appeal in the personal injury action. The appellate court affirmed, holding that there is a difference between "void" judgments, where the trial court lacks jurisdiction over the subject matter or the parties, and "voidable" judgments, where the trial court has fundamental jurisdiction over the subject matter or the parties, but then acts in excess of its jurisdiction. Where a void judgment can be subject to attack at any time, a voidable judgment is subject to waiver, estoppel, and forfeiture. The appellate court ruled that the appeal from the earlier judgment did not divest the trial court of jurisdiction to rule on the merits of the later amended complaint, since the claims arising from the husband's wrongful death did not implicate the earlier judgment on the personal injury claims. The appellate court further held that, even if the trial court's decision to permit the amended complaint during the appeal was in excess of its jurisdiction, Elementis failed to preserve the error by answering the amended complaint, stipulating to a stay of the amended complaint proceedings pending appeal, and by participating in the wrongful death trial.

Marteney is a cautionary tale for all practitioners to reacquaint themselves with how and when the "automatic" stay applies, as set forth in Chapter 2 of the *Code of Civil Procedure*.

International Mesothelioma Interest Group – New Consensus Paper

Medical experts on mesothelioma have published a consensus statement, which updates the medical community on the pathologic diagnosis of this disease. The group of authors include Richard Attanoos, MD, Andrew Churg, MD, Allen Gibbs, MD, Alberto Marchevsky, MD, and Victor Roggli, MD, who represent the most prominent researchers world-wide, as well as experts who are retained by asbestos defendants. The statement, *Guidelines for Pathologic Diagnosis of Malignant Mesothelioma, 2017 Update of the Consensus Statement*, Arch Pathol Lab Med, 2017 Jul 7, doi: 10.5858/arpa.2017-0124-RA, may be found here:

http://www.archivesofpathology.org/doi/pdf/10.5858/arpa.2017-0124-RA

- Overview

The statement provides the latest guidelines for pathologists for making a diagnosis of malignant mesothelioma – an aggressive cancer linked to asbestos exposure, almost always fatal – as well as information on new therapies available for the disease and the efficacy of those treatments.

While this statement provides practical information on how a physician pathologist makes a diagnosis, it can be useful to attorneys or case evaluators who are involved in asbestos litigation. The paper has valuable information for evaluating or examining expert witness pathologists on their findings, including their visual evaluation of tissue histologically and their findings on immunohistochemical staining for a diagnosis of malignant mesothelioma ("MM").

More specifically, the statement has discussion and consensus opinion regarding guidelines for:

(1) distinguishing benign from malignant mesothelial proliferations (both epithelioid and spindle cell lesions), (2) cytologic diagnosis of MM, (3) recognition of the key histologic features of pleural and peritoneal MM, (4) use of histochemical and immunohistochemical stains in the diagnosis and differential diagnosis of MM, (5) differentiating epithelioid MM from various carcinomas (lung, breast, ovarian, and colonic adenocarcinomas, and squamous cell and renal cell carcinomas), (6) diagnosis of sarcomatoid MM, (7) use of molecular markers in the diagnosis of MM, (8) electron microscopy in the diagnosis of MM, and (9) some caveats and pitfalls in the diagnosis of MM.

- Highlights
  - Cytology

Significantly, the group takes the position that there is limited usefulness in making a MM diagnosis from cytology. This is important in asbestos cases whether the diagnosis is made primarily from cytology and where no tumor tissue is available.

  - Histologic Diagnosis

Histologic diagnosis, how cells look under a microscope, is important in distinguishing benign from malignant epithelioid or spindle cell mesotheliomas. Among the three subtypes of epithelioid, sarcomatoid or mixed (biphasic) categories, multiple cellular patterns have been described. The recognition of these patterns is helpful diagnostically and will guide the differential diagnosis. While the pathologist may comment on or describe the patterns, the group recommends that the major histologic subtype must be given in the final diagnosis. In the medicolegal setting, the statement is informative and useful for examining expert pathologists regarding their diagnosis with specificity.

  - Molecular Testing

With advances in medical technology, the group recommends that molecular markers should be considered, including genetic alterations such as the deletion of the p16 tumor suppressor protein. While these markers are being used to understand the pathogenesis of the disease or in the development of targeted therapies, their potential for diagnostic or prognostic implications have only recently been extensively investigated. The availability of these additional diagnostic tools should be considered and potentially utilized in disputed MM litigation cases, or evaluated by defense experts or consultants where molecular testing had been done.

  - Immunohistochemical Evaluation

Immunohistochemical ("IHC") panels are integral to making a MM diagnosis and the statement lays out the various stains utilized by pathologists, but advises that the makeup of the stains used should depend on the differential diagnosis and what is available to a pathology laboratory. IHC panels should have both positive and negative markers and should have sensitivity or specificity greater than 80 percent for the cancers in question. In medicolegal cases where a pathologist's findings including the strength or

location of staining are in question, the group's position and recommendations will likely be a potential cross-examination topic.

In the typical MM case in which all features are concordant, it is recommended that two mesothelioma markers and two carcinoma markers may be adequate for a diagnosis; however, when there are discordant findings, additional markers should be used. The pathologist should always take the clinical, radiologic, and pathologic features into consideration and receive an expert second opinion in difficult cases, as necessary.

- Pathologic Predictors of Prognosis

There have only been modest improvements in median survival of MM patients in the last four decades and extensive research has been conducted on prognostic factors which bear on why the few individuals who survived longest did so. The authors focused on two factors:

(1) Histologic Subtyping

Histologic subtyping has been found to be a strong predictor of survival and, although it has not been traditionally performed due to the overall poor prognosis of persons diagnosed with MM, the group recommends it should be done. For example, pathologic factors showing poor prognosis are the non-epithelioid subtypes of sarcomatoid mesothelioma. While this recommendation impacts the treatment and care provided to mesothelioma patients, it may reflect on the opinions of expert pathologists in asbestos cases who do not subtype, or impact on other expert opinions such as treatment options and related costs, life expectancy estimates, and the evaluation of economic and non-economic damages.

Other factors affecting prognosis and response to therapy are being studied. Nuclear grading of epithelioid MM appears promising, and the statement is informative on emerging technologies, which may be useful in the diagnosis and treatment of the disease.

(2) Staging MM

The Union for International Cancer Control and American Joint Committee on Cancer, *Cancer Staging Manual, 8th edition*, became available in January 2017, which provides information on the most used staging system. Pathologic staging is useful as a guide to surgical therapy, and is used to determine whether a patient has the potential to undergo tumor resection. However, it is not a good predictor of prognosis.

- Summary

The statement provides the guidelines used by pathologists for making a MM diagnosis and is a useful reference for the asbestos litigator or case evaluator in understanding how mesothelioma is diagnosed. It can be utilized in deposition and trial examinations to give clarity or criticism to opinions advanced by expert witnesses. Also, this article provides insight on emerging technologies relevant to MM.

Recent California Asbestos Litigation Jury Verdicts

The following are the California asbestos case verdicts of which we are aware from January through November 2018:

- *Rigor v. 3M Company*

A Van Nuys jury reached a defense verdict for 3M Company on February 15, 2018, in a personal injury mesothelioma matter filed by the Madeksho Law Firm on behalf of 86-year-old plaintiff Angel Rigor, a former welder, pipefitter, and millwright. He claimed he was exposed to asbestos over 40 years, and that 3M's respirator failed to protect him from asbestos fibers. The plaintiff initially demanded $25.5 million, including punitive damages. While four defendants remained at trial, 3M was the sole remaining defendant at time of verdict. 3M's primary defense at trial was that, when worn correctly, the respirator worked. The Hon. Elaine Mandel presided.

- *Gomez v. ABB Preheater, Inc.*

A Santa Monica jury hit Metalclad Insulation with a plaintiff verdict totaling approximately $25 million in a wrongful death mesothelioma matter. The plaintiffs claimed the decedent, 66-year-old Hortencia Gomez, was exposed to asbestos while working as a janitor at a power plant between 1992 and 1996. The plaintiffs claimed that Metalclad exposed her to asbestos through its abatement work at the plant. Gomez was diagnosed with mesothelioma in 2013, and claimed her only known exposure was her work at the power plant. The jury concluded Metalclad was 87 percent at fault. The plaintiff was awarded $7.5 million in non-economic damages and $18,750,000 in punitive damages. The parties stipulated to $48,000 in economic damages.

Plaintiffs were represented by Simona Farrise of the Farrise Law Firm and Benjamin Adams of Dean Omar Branham. The Hon. Lawrence Cho presided.

- *Keown v. A.W. Chesterton Co.*

Union Carbide was awarded a defense verdict by a Los Angeles jury in the personal injury mesothelioma matter entitled *George Keown, et al. v. A.W. Chesterton Co., et al.* on March 8, 2018. Keown, 71, alleged that he was exposed to asbestos while working at D'Velco Manufacturing between 1963 and 1976, as a machinist and later as a sales representative. He alleged bystander exposure to construction materials, including joint compound and sheetrock. While the jury concluded Union Carbide was negligent and its raw asbestos was defective, they did not find that it was a substantial factor in Keown's mesothelioma.

Plaintiffs were represented by Simona Farrise of the Farrise Law Firm, Roger Gold of the Gold Law Firm, and Steven Patti of Clapper, Patti, Schweizer & Mason. The Hon. David Cunningham presided.

- *Mata v. Air Liquid Systems Corp.*

A Long Beach jury returned an $8.85 million plaintiff verdict on April 23, 2018, in a personal injury matter for plaintiffs Alfred Mata and Leticia Mata against Liberty Utilities (Park Water) Corp. The plaintiffs alleged that Alfred Mata, 66, developed mesothelioma as a result of his exposure to asbestos through his father, Francisco Mata, who cut and installed asbestos-cement pipe while employed by Park Water, a private contractor that provided water to a number of cities in Southern California. The plaintiffs claimed that Francisco brought home asbestos fibers on his clothing and exposed his son, Alfred. The jury awarded $856,500 in economic damages and $2,997,000 in non-economic damages. The jury found Park Water 54 percent at fault, with CertainTeed, Johns-Manville, Parkson, Robert Stoddard, and Taylor Jett also allocated fault. Though punitive damages in the amount of $5 million were awarded, the Court later vacated the award of punitive damages as excessive. According to the verdict form, the parties stipulated to $200,000 in offsets/credits.

Plaintiffs were represented by Mark Bratt, Benno Ashrafi, and Leonard Sandoval of Weitz & Luxenberg. The Hon. Michele Flurer presided.

- *Kramer v. 3M Company*

An Alameda jury returned a $6.8 million verdict on May 2, 2018, against Amcord, Inc., in *Kramer v. 3M Company, et al*. Plaintiff Kenneth Kramer, 60, a freelance construction worker, alleged that as a result of his exposure to various asbestos-containing construction materials, including Riverside gun plastic cement, he developed mesothelioma. The plaintiff suffered from a very rare form of mesothelioma, lymphoma lymphomatoid, which experts say leads to a better survival rate. In fact, Kramer was two years post-treatment with no evidence of ongoing disease at the time of the verdict. The jury awarded $1.8 million in economic damages and $5 million in non-economic damages.

Amcord was found 20 percent at fault.

Kramer was represented by Eric Brown of Deblase Brown & Eyerly and Matt Mcleod of Shrader & Associates. The Hon. Robert McGuinness presided.

- *Anderson v. Borg-Warner Corp.*

A West Covina jury returned a plaintiff verdict on May 23, 2018, finding in favor of plaintiff Joanne Anderson in the *Joanne Anderson v. Borg-Warner Corp., et al.* matter. Simon Greenstone filed the personal injury matter on behalf of Joanne Anderson, 68, in Los Angeles Superior Court, alleging exposure to asbestos-contaminated Johnson & Johnson Baby Powder and through shade-tree automobile repairs. Unlike most cosmetic talc contamination matters we are currently seeing, Anderson claimed to have kept in her possession two canisters of Johnson & Johnson baby powder from when she started using it in 1978, which were subsequently tested by the plaintiffs' experts, who concluded they contained trace amounts of asbestos. Johnson & Johnson was the only defendant remaining at trial. The jury awarded Anderson $21.7 million in compensatory damages ($700,000 in economic damages) and found Johnson & Johnson 67 percent at fault. The jury also awarded $4 million in punitive damages.

David Greenstone, Chris Panatier, and Conor Nideffer of Simon Greenstone represented the plaintiffs. The Hon. Gloria White-Brown presided.

- *Knutson v. Air Liquid & Systems*

An Oakland jury returned a defense verdict on August 8, 2018, in the wrongful death matter of *Donald Knutson, et al. v. Air Liquid & Systems, et al.* The plaintiffs claimed that decedent Donald Knutson, 71, was exposed to asbestos while serving as a machinist at San Francisco Naval Shipyard between 1966 and 1973, when using an AMMCO brake arc grinder, through home remodel repairs, and through shade-tree automobile repairs. Hennessy, sued as successor to AMMCO Tools, was the remaining defendant at verdict. While the jury concluded that the decedent worked with or around AMMCO brake arc grinders, the jury did not find that AMMCO was negligent in designing, manufacturing, or selling the brake arc grinder or that the company should be held liable on negligent failure-to-warn. Moreover, the jury rejected the plaintiffs' negligence (recall/retrofit) and strict liability (design defect risk-benefit test and consumer expectations, and failure to warn) causes of action.

Plaintiffs were represented by Robert Green and Michael Reid of Weitz & Luxenberg. The Hon. Brad Seligman presided.

- *Hopper v. California Department of Water Resources*

An Alameda jury returned a plaintiffs' verdict on August 14, 2018, in the wrongful death matter of *Carolyn Hopper, et al. v. California Department of Water Resources, et al.* The jury concluded defendant P.E. O'Hair was 20 percent liable while also allocating a majority of fault to Johns-Manville, a manufacturer of asbestos-cement pipe. The plaintiffs claimed that former pipefitter Roy Dale Hopper, 77, was exposed to asbestos while working as a pipefitter on pipeline projects in Northern California in the 1960s. The plaintiffs claimed P.E. O'Hair supplied asbestos-cement pipe to one of his projects. The jury awarded the plaintiffs approximately $1.1 million in damages, which included approximately $117,800 in economic damages and $1 million in non-economic damages. The plaintiffs had asked the jury to award 60 percent fault to P.E. O'Hair and find malice for punitive damages.

Walsworth represented P.E. O'Hair and the plaintiffs were represented by Peter Kraus, Rachel Gross, and Rajeev Mittal of Waters Kraus & Paul. The Hon. Robert McGuiness presided.

- *Swanson v. A.O. Smith Water Products*

A Pasadena jury returned a defense verdict and a Los

Angeles jury returned a plaintiffs' verdict on August 28, 2018, in the wrongful death matter of *Shawn Swanson v. A.O. Smith Water Products, et al.* The case involved the alleged mesothelioma and wrongful death of 68-year-old former pipefitter and plumber Robert Swanson. The case was filed in Los Angeles Superior Court by Waters Kraus & Paul. Plaintiff Shawn Swanson claimed his father was exposed to asbestos by asbestos-containing boilers, gaskets, rope and cement. Weil-McLain was the remaining defendant at verdict. Though the case was tried in California, Michigan law was applied, so the jury had to find Weil-McLain acted with gross negligence to overcome Michigan's $750,000 damages cap, which it did. The jury found in favor of the plaintiff and awarded $2.75 million in pain and suffering, $1.5 million for Shawn's past lost service, parental training, guidance, society, and companionship; and $4.2 million for Shawn's future lost service, parental training, guidance, society, and companionship. The jury found Weil-McLain 60 percent liable.

The plaintiff was represented at trial by Gary Paul and Erin Wood of Waters Kraus & Paul. The Hon. C. Edward Simpson in Alhambra presided.

- *Barr v. Parker Hannifin*

An Alameda jury returned a plaintiff's verdict in the *Barbara Barr v. Parker-Hannifin Corporation* matter, a living pleural mesothelioma matter, on November 5, 2018. The plaintiff, 71, alleged that she was exposed to asbestos while working as a parts clerk at an auto store between 1979 and 1988 and through her husband's work as a mechanic. Though her father had worked at Hunters Point Naval Shipyard her entire childhood, this was not heard by the jury because there was no competent evidence regarding his employment. The jury concluded Parker-Hannifin, as successor-in-interest to EIS Brake Parts, was 85 percent liable, and divided the remaining 15 percent equally among Bendix, Raybestos, and Wagner Brakes. The parties stipulated to medical specials totaling $80,592, and the jury awarded an additional $539,494 in economic damages, for a total of $620,086. The jury further awarded $8 million in non-economic damages. There was also a finding of malice as to Parker-Hannifin. The jury awarded $6 million in punitive damages.

The plaintiff was represented by William Ruiz of Maune Raichle. The Hon. Judge Stephen Kaus presided.

- *Allen v. Brenntag North America, Inc.*

A jury in Humboldt County returned a defense verdict on November 14, 2018, for Johnson & Johnson in the *Carla Allen v. Brenntag North America, Inc.*, matter. While the jury believed that Carla Allen, 51, was exposed to asbestos by Johnson & Johnson Baby Powder and that it had a manufacturing defect, the jury concluded that the baby powder was not a substantial factor in Allen's development of mesothelioma. Further the jury concluded that the baby powder did not fail to perform as safely as an ordinary consumer would have expected when used or misused as intended. Allen claimed that from the late 1960s to the early 2000s she was exposed to asbestos by Johnson & Johnson Baby Powder. Plaintiffs' complaint also identified Cashmere Bouquet as a source of asbestos exposure.

Allen was represented by David Greenstone and Conor Nideffer of Simon Greenstone Panatier. The Hon. Timothy Canning presided.

- *Morgan v. CBS Corporation*

A Compton jury returned a plaintiffs' verdict against J-M Manufacturing Company, Inc., on November 13, 2018, for approximately $15 million in compensatory damages and, on November 15, 2018, awarded an additional $15 million in punitive damages in the *Norris Morgan v. CBS Corporation, et al.* matter. Plaintiffs Norris and Lori Morgan alleged that Norris Morgan, 64, was exposed to asbestos through his own work in construction and while supervising others as a superintendent for a general contractor. Among their allegations, the plaintiffs claimed that

Morgan was present when others cut asbestos-cement pipe in his presence between 1979 and 1986. At the time of trial, Familian Corporation and J-M Manufacturing Company, Inc., were the last remaining defendants, with Familian resolving shortly before closing statements. During closing arguments, the plaintiffs sought $17 million in compensatory damages and 45 percent fault to J-M Manufacturing Company, Inc. Following a day of deliberations, the jury returned the $15 million verdict and determined J-M Manufacturing Company, Inc., was 45 percent at fault – allocating the remaining fault to Morgan, Morgan's employers, CertainTeed, Johns-Manville, Familian, and various joint compound manufacturers.

Plaintiffs were represented by Scott Peebles and Rob Woodward of Simmons Hanly. The Hon. Maurice Leiter presided.

- Notable Mistrials

Recently, two asbestos-contaminated personal talc cases resulted in mistrials in Los Angeles, specifically the *Weirick v. Brenntag North America* and *Von Salzen v. American International Industries, Inc*., matters filed by Simon Greenstone and Panatier.

The *Weirick* trial in Pasadena, California, was a personal injury mesothelioma matter involving claims of asbestos exposure through use of Johnson & Johnson Baby Powder. Plaintiff Carolyn Weirick, 59, was a school counselor who alleged that she used Johnson & Johnson Baby Powder and later Shower-to-Shower for more than 40 years. Her sole alleged exposure was to asbestos-contaminated talc. The plaintiffs claimed that baby powder found in her home contained 11 asbestos fibers, which was "enough to have caused her cancer." The plaintiffs had asked for $25 million in damages. A mistrial was declared after weeks of trial and a hung jury.

The plaintiff was represented by Jay Stuemke of Simon Greenstone and Panatier. The Hon. Margaret Oldendorf presided.

The *Von Salzen* matter went forward in Los Angeles before a mistrial jury deadlocked at 8-4 in favor of plaintiff Kirk Von Salzen, 74, who claimed he was exposed to asbestos by contaminated Johnson & Johnson Baby Powder in addition to other talc products, which he claimed were contaminated with asbestos, that he used daily for 30 years. Johnson & Johnson was the only defendant remaining at trial. The plaintiff sought $12 million in damages.

Plaintiff was represented by Stuart Purdy of Simon Greenstone and Panatier. The Hon. Stephen Moloney presided.

While not in California, it is notable that Johnson & Johnson obtained a second mistrial in South Carolina where a 30-year-old attorney's husband claimed his late wife's exposure to asbestos-contaminated talc led to her development of mesothelioma. The plaintiff also named friction defendants for her alleged bystander exposure to asbestos, which Johnson & Johnson and Rite Aid pointed to as her only source of exposure to asbestos. The plaintiffs sought $63 million in compensatory damages. The decedent had a rare form of mesothelioma, pericardial mesothelioma, which defense experts testified has not been associated with asbestos exposure. The first mistrial was declared earlier this year after the jury could not come to a unanimous decision about Johnson & Johnson, but did conclude that there was no evidence decedent ever used talc purchased from a Rite Aid-owned store.

The case, *Antonie Bostic v. Johnson & Johnson, et al*., was tried by Christopher Swett and John Herrick of Motley Rice LLC for the plaintiffs. The Hon. Jean Toal presided

About Walsworth

Walsworth was founded in 1989 with a commitment to establish a law firm focused on working collaboratively with clients to meet their unique objectives. The firm has since grown to more than 70 attorneys with offices in Orange, Los Angeles, San

Francisco, and Seattle, and is known for excellence in litigation and transactional matters. We are equally distinct in our long-standing commitment to diversity, which is recognized through our certification as a Women's Business Enterprise (WBE) by the Women's Business Enterprise National Council and the California Public Utilities Commission, and we are proud to be the largest certified WBE law firm in the United States. Walsworth is also a National Association of Minority and Women Owned Law Firms (NAMWOLF) member, the largest in California and the third-largest nationwide. For more information, visit www.wfbm.com.