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February 1, 2011

Re: PENNSYLVANIA SUPREME COURT GRANTS
ALLOCATUR TO CONSIDER ISSUE OF EXPERT
EXTRAPOLATION IN CAUSATION OF
MESOTHELIOMA

TO THE COMPANIES IN INTEREST:

The Pennsylvania Supreme Court has recently granted allocatur in a case involving allegations of asbestos exposure from friction-based products which could change the way plaintiffs establish causation in Pennsylvania asbestos cases. In Betz v. Pneumo Abex, the Supreme Court will consider the limited issue of whether the Superior Court erred in reversing the trial court's decision to exclude testimony of the plaintiffs' experts. The experts opined that if large doses of asbestos exposure can lead to mesothelioma, then small doses can as well. The trial judge in Betz granted a global *Frye* motion on behalf of several friction product defendants which argued that epidemiological studies have shown that automotive repair work does not cause mesothelioma. The defendants also argued that the plaintiffs' experts' theories which inferred causation from *any* exposure to asbestos contradicted the epidemiological studies and were therefore novel and "scientifically unsound". The trial court precluded testimony from the plaintiffs that they contracted any asbestos-related disease from automobile brake repair work, and thereafter granted summary judgment in favor of the friction defendants.

On appeal, the plaintiffs argued that there was nothing new or novel about their experts' reports which stated that doing automotive brake repair work could lead to mesothelioma. According to the plaintiffs, this issue has been the subject of numerous scholarly articles published as far back as 1935, as well as a 1986 report by the U.S. Environmental Protection Agency. They also pointed to 15 other cases in Pennsylvania in which experts have testified to the very conclusions that their experts were going to testify. In response, the defendants argued that expert testimony can be challenged under *Frye* even if it has been employed for long periods of time, so long as there is a legitimate dispute among experts about the reliability of certain conclusions. The defendants also argued that epidemiological studies are considered the "gold or litmus test" for causation in asbestos cases, and therefore any evidence that contradicts them should be inadmissible.

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The Superior Court reversed the trial judge's ruling, holding that his decision lacked any foundation in science or evidence and was based on reasons never presented by any of the parties in the case. Specifically, it noted that the trial judge failed to decide the first of a two-prong test to determine whether evidence should be admitted under *Frye*, and instead just concluded that the experts' use of extrapolation to reach their conclusions was novel. The appellate court further held that the trial court acted improperly because it granted the defendants' *Frye* motion based on arguments never raised by the defendants themselves, or supported by any expert witnesses.

In its petition for allocatur, Ford, one of the friction defendants, argued that extrapolation down methodology is not a valid scientific theory, and therefore permitting the Superior Court's ruling to stand would effectively allow "junk science" into the courtroom. In support of its argument, Ford pointed to the prior opinion of Philadelphia Court of Common Pleas Judge Allan Tereshko in In re Asbestos Litigation, noting that Judge Tereshko came to the very same conclusion as the trial judge in Betz regarding extrapolation down methodologies.

While the trial and appellate courts remain split on the issue, the Superior Court noted that all would benefit from additional guidance from the Supreme Court on the proper approach to take where experts seek to use extrapolation as a methodology to support their theories. Aside from friction defendants however, manufacturers and suppliers alike will surely await this significant decision that could raise the bar for how asbestos plaintiffs must prove causation in Pennsylvania.

Should you have any questions about the above, please do not hesitate to contact me. For other "Companies In Interest Letters", please visit our website at www.bbs-law.com.

Very truly yours,

Charity C. Hyde
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