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The Evolution of the “Any Exposure” Theory of Causation

by Diane Davis



The “any exposure” theory of causation, also known as the any fiber theory, essentially stands for the premise that each and every occupational or para-occupational exposure to asbestos during a person’s lifetime, regardless of the amount of the exposure, substantially contributes to the onset of the asbestos related disease including asbestosis, lung cancer, or mesothelioma.

Jurisdictions are split as to whether a plaintiff can rely on this theory of causation. This “any exposure” theory has gained significant attention as it has been used to expand the basis for liability for such insignificant exposures including the handling of brake pads, removal of gaskets, or merely working in a building with asbestos even if there has been no disturbance of the asbestos-containing product. While most courts have chosen to reject or limit the application of the “any exposure” theory of causation, there are certain jurisdictions that have allowed its application. Below is an analysis of (i) the foundation for the any exposure theory of causation, which includes the states that allow a plaintiff’s expert to rely on this theory to establish causation; and (ii) the states that have excluded the use of this theory.

Foundation for the Any Exposure Theory of Causation

The traditional method for proving causation in asbestos cases requires a plaintiff to establish that the exposure to the particular product as substantial enough to result in the development of the asbestos related disease. However, many courts have lowered the causation requirement by allowing a plaintiff set forth some testimony or documents to show that the plaintiff was exposed to a defendant’s product. As such, many of the plaintiffs’ experts will opine that any exposure to asbestos that a plaintiff incurs from an occupational or para-occupational activity is a substantial factor in the development of the asbestos related disease.

In the matter of *Rost v. Ford Motor Company*, the Superior Court of Pennsylvania rejected an appeal from Ford requesting a new trial and upheld the plaintiff’s expert’s reliance on the “any exposure” theory of causation. At trial in the Philadelphia Court of Common Pleas, a jury awarded \$1 million to the plaintiff and his wife, who alleged that the plaintiff developed mesothelioma as a result of his exposure to asbestos-containing brakes manufactured by Ford. On appeal, Ford argued that the verdict should be overturned and a new trial granted because the plaintiff’s reliance on the “any exposure” causation theory was contrary to binding Pennsylvania Supreme Court precedent, which barred the use of this theory to establish causation in *Betz v. Pneumo Abex LLC*. The *Rost* court held that the *Betz* decision was not applicable because the plaintiffs’ experts in *Rost* provided sufficient evidence establishing Ford’s liability. While the court acknowledged that the “any exposure” theory cannot be used to establish legal causation and liability, the mere fact that an expert witness mentions the theory is not cause enough to reverse a verdict.

Maryland also addressed the “any exposure” theory in the matter of *Dixon v. Ford Motor Co.* In *Dixon*, Maryland’s highest court reversed a decision of a lower appellate court that overturned a jury verdict in favor of the plaintiff. The court concluded that the trial court did not err by allowing the plaintiff’s expert to testify regarding the “any exposure” theory to establish causation because there was significant causation evidence offered against the particular defendant to justify the jury’s causation finding. However, the Court noted that this decision did not imply that the “any exposure” theory was valid under Maryland law and it did not intend to address its validity because there was significant evidence to establish causation without the experts’ testimony that relied on the “any exposure” theory of causation.

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Upcoming Seminar

The poster for the 'Trial Tactics' seminar features a green and white color scheme. At the top left is the 'dri' logo with the tagline 'The Voice of the Defense Bar'. The main title 'Trial Tactics' is prominently displayed, followed by the subtitle 'Mastering Skills and Simplifying Complexity'. A list of bullet points includes: 'Mock voir dire and Daubert hearing', 'Multi-party mediations and cases', 'Master facts and deal with surprise', and 'Lessons from other specialties'. A pink sign with the text 'Do Not Enter Jury Deliberating' is shown. The event details at the bottom specify 'March 18-20, 2015' at 'Caesars Palace Las Vegas, Las Vegas, Nevada'. A small logo at the bottom right reads 'dri delivers resources to build your practice'.

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Rejection of the Any Exposure Theories of Causation Pursuant to a Daubert Motion

Although this theory opines that each and every occupational and para-occupational exposure to asbestos contributes to the asbestos related disease, supporters of the "any exposure" theory of causation often do not opine that background exposures in asbestos, regardless of the significance of the background levels of exposure, contribute to the onset of the disease. Thus, both state and federal courts across the country have chosen to reject this "any exposure" theory of causation and require specific proof of exposure as well as dose. In recent years, courts in Virginia, Louisiana, Georgia, and Texas have rendered decisions that reject or limit the application of the "any exposure" testimony.

In *Barabin v. AstenJohnson, Inc.*, the Ninth Circuit held that a district court improperly allowed testimony from the plaintiff's expert regarding "any exposure" theory without first examining the relevancy and reliability of the expert testimony under *Daubert v. Merrell Dow Pharm., Inc.* This case appears to create a precedent wherein district courts will now have to conduct a *Daubert* review of the admissibility of the "any exposure" testimony prior to its admission into evidence.

Moreover, in the recent case of *Davidson v. Georgia-Pacific, LLC*, the United States District Court for the Western District of Louisiana reviewed four motions for summary judgment as well as various Daubert motions filed on behalf of certain defendants seeking to exclude the testimony of Dr. David Schwartz, plaintiffs' causation expert, and William Ewing, plaintiffs' industrial hygienist. The plaintiffs alleged that Decedent, Cleve Davidson, developed and died from mesothelioma as a result of his exposure to asbestos from various products. Dr. Schwartz issued three reports in the case. In his first report, Dr. Schwartz stated that each and every exposure to asbestos contributed to the development of the decedent's mesothelioma. In his second and third reports, the plaintiffs' expert opined that each and every exposure to asbestos above background levels contributed to the development of Decedent's mesothelioma, butacknowledged that not every single asbestos fiber contributed to the development of mesothelioma. Moreover, Dr. Schwartz was deposed on two occasions. During his deposition, the expert testified that he could not identify any specific cause of the decedent's mesothelioma. In addition, he was unable to identify any specific defendant's product as a substantial contributing factor of Decedent's mesothelioma.

The defendants argued that the "any exposure" theory does not meet the Daubert standards and cited various federal and state courts that excluded the theory under Federal Rule of Civil Procedure 702 and *Daubert*. First, the defendants cited two Utah district court decisions, *Anderson v. Ford Motor Company* and *Smith v. Ford Motor Company*. In both cases, the plaintiffs' experts were expected to testify that every exposure to asbestos caused the decedent's mesothelioma. However, neither expert could identify a particular defendant's product as having caused the decedent's mesothelioma. The courts in *Anderson* and *Smith* granted the Daubert motions excluding the experts from testifying, finding the "every exposure" theory inadmissible under *Rule 702* and *Daubert*. In addition, the defendants relied upon the California district court case, *Scalfani v. Air and Liquid Systems Corporation*. The court in *Scalfani* granted the defendants' motion in limine to exclude the expert's testimony, noting that the "any exposure" theory was not supported by data, could not be tested, and was not published in peer-reviewed works. Finally, the defendants cited *Butler v. Union Carbide Corporation*, where the plaintiffs' expert intended to testify that every exposure to asbestos contributed to the decedent's mesothelioma but could not identify any particular defendant's product as a cause. The trial court excluded the expert's "any exposure" testimony and concluded that it failed to satisfy the Dauber factors as the theory was not testable and had no error rate.

The *Davidson* court agreed with the defendants, concluding that because the "any exposure" theory was not testable and did not have an error rate, it failed to satisfy two Daubert factors. The court also ruled that the "any exposure" theory conflicted with the "substantial factor" test of causation that applies under Louisiana law. The court reasoned that if a plaintiff could establish causation with the "every exposure" theory, then every exposure to asbestos would be deemed a substantial factor, no matter the "frequency, duration, and proximity of exposure." The court therefore concluded that the "any exposure" theory was inconsistent with Louisiana law and granted the defendants' Daubert motions.

Finally, in *Bostic v. Georgia Pacific Corporation*, the Texas Supreme Court also rejected the use of "the any exposure" theory to establish causation and concluded that proof of "some exposure" or "any exposure" alone is not sufficient to establish causation in both asbestosis and mesothelioma cases. The court



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further stated if any exposure at all were sufficient to cause mesothelioma then everyone would suffer from the disease or at least be at risk of contracting the disease. The court concluded that acceptance of the “any exposure” theory of causation would ignore the importance of dose under Texas law in determining causation and impose liability in instances where exposure to background levels or some other exposure caused the asbestos related disease. The court further noted that the “any exposure theory negates the plaintiff’s burden of proving causation by a preponderance of the evidence by “effectively accept[ing] that a failure of science to determine the maximum safe dose of a toxin means that every exposure, regardless of amount, is a substantial factor in causing the disease.” The court recognized the flawed inherent nature of a theory that concludes that exposure to a defendant’s product above background level should impose liability yet exposure to background levels of asbestos should be ignored.

Conclusion

Although plaintiffs’ attorneys will continue to attempt to establish causation through the use of the “any exposure” theory, recent federal and state court decisions indicate that the courts are willing to reject any theory that focuses solely on “any” exposure to a defendant’s product without any recognition of the plaintiff’s exposure to background levels to asbestos. Moreover, even courts that allow an expert to rely on “any exposure” theory of causation still require additional evidence of exposure exceeding a “single fiber” to establish causation. Defense counsel should be prepared to challenge the admissibility of expert testimony concerning the “any exposure” theory pursuant to a Daubert motion or motion in limine. This will require defense counsel to coordinate with their experts to develop appropriate deposition questions to demonstrate the weaknesses of the theory. Moreover, defense counsel should also be prepared to prepare a motion to challenge the use of the theory based on its failure and conflict with the particular jurisdiction’s standard of causation. Finally, defense counsel should remain as informed as possible on the recent federal and state decisions that reject the application of the theory so that counsel can be prepared to argue the analogous and/or distinguishing facts of the particular cases when challenging the application of the “any exposure” theory.

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