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Once again, the California Supreme Court refuses to rule on the 'every exposure' theory of causation

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In conflict with many other jurisdictions, the intermediate appellate courts in California have allowed expert testimony in toxic tort cases based on an "every exposure" theory of causation (or its variants such as the "every identified exposure" theory).

Under that theory, even a minuscule exposure attributable to a defendant is by definition a substantial factor in causing disease, regardless of the circumstances of exposure or comparison to greater exposures attributable to other sources.

On June 14, 2017, the California Supreme Court declined its latest opportunity to join the legal mainstream on this issue, denying review in *Phillips v. Honeywell International Inc.*, Case No. S241544.

The "every exposure" theory typically arises in toxic tort cases involving latent diseases. The causation standard is critical in low-dose exposure cases, which often turn on disputed evidence about sporadic exposure decades ago, and controversial opinions about whether low-dose exposures are capable of causing disease.

Although the issue arises most frequently in asbestos cases like *Phillips*, it can arise in any case in which the plaintiff claims injury from minute exposure to an alleged toxin.

The highest courts of other states have concluded that the "every exposure" theory is fundamentally inconsistent with the Restatement (Second) of Torts' substantial-factor causation test, which the California Supreme Court has also adopted.

For example, the Texas Supreme Court addressed the issue in *Bostic v. Georgia–Pacific Corp.*, 439 S.W.3d 332 (Tex. 2014). Plaintiffs offered expert opinion that every asbestos exposure above background levels causes mesothelioma, but the court concluded that theory was inadmissible. *Id.* at 353.

Applying the Restatement's substantial factor test, the court held that a plaintiff in an asbestos case must provide defendant-specific evidence quantifying the approximate dose to which the plaintiff was exposed, and evidence that such a dose was a substantial factor in causing the plaintiff's disease. *Id.* at 340, 353.

"The any exposure theory effectively accepts that ... every exposure, regardless of amount is a substantial factor in causing the plaintiff's illness. This approach negates the plaintiff's burden to prove causation by a preponderance of the evidence." *Id.* at 340.

The court held that the plaintiff's proof "need not be established with mathematical precision," but at the same time, "the dose must be quantified." *Id.* at 353.

The Pennsylvania Supreme Court also rejected the notion that plaintiff can establish causation simply by showing some exposure to the defendant's product and then presenting expert testimony that "every exposure above background" is a substantial factor. *Betz v. Pneumo Abex, LLC,* 44 A.3d 27, 56-57 (Pa. 2012).

In a case in which the plaintiff alleged his mesothelioma was caused by exposure to asbestos-containing friction products, including brake linings, the court declined to allow liability to rest on a legal fiction parroted by plaintiffs' experts: "[W]e do not believe that it is a viable solution to indulge in a fiction that each and every exposure to asbestos, no matter how minimal in relation to other exposures, implicates a fact issue concerning substantial-factor causation." *Ibid.*

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In *Moeller v. Garlock Sealing Technologies, LLC*, 660 F.3d 950, 955 (6th Cir. 2011), the US Court of Appeals for the Sixth Circuit also rejected the "every exposure" theory.

The court reversed a verdict in favor of the plaintiff, finding that the "every exposure" theory did not show that exposure to asbestos in the defendant's products was a substantial cause of plaintiff's mesothelioma.

The court analogized the theory as "be[ing] akin to saying that one who pours a bucket of water into the ocean has substantially contributed to the ocean's volume." *Ibid.*

The Georgia Supreme Court addressed the issue last year in *Scapa Dryer Fabrics, Inc. v. Knight*, 788 S.E.2d 421 (Ga. 2016). Georgia causation law does not require a defendant's conduct to be a "substantial" factor; it need only make a "meaningful contribution" — more than "de minimis." *Id*. at 425-26.

Even under this less stringent standard, the Georgia Supreme Court ruled that an expert's "every exposure" opinion was inadmissible because it eliminated any need to "estimate the extent of exposure in any meaningful way" and "could not have been helpful to the jury." *Id.* at 426.

Other courts are continuing to take up the issue, including the Ohio Supreme Court, which agreed to address it in *Schwartz v. Honeywell International, Inc.*, 66 N.E.3d 118 (Ohio Ct. App. 2016), review granted Apr. 19, 2017, 2017-Ohio-1427.

The Ohio Supreme Court's action follows on the heels of a February 2017 decision from a New York appellate court, which rejected plaintiffs' reliance on the "every exposure" theory. *In re New York City Asbestos Litigation*, 148 A.D.3d 233, 234-35 (N.Y. App. Div. 2017).

The Ninth Circuit addressed the issue just last year, observing that if plaintiffs could prove causation through an "every exposure" opinion, that "would undermine the substantial factor standard and, in turn, significantly broaden asbestos liability." *McIndoe v. Huntington Ingalls Inc.*, 817 F.3d 1170, 1177 (9th Cir. 2016).

The intermediate appellate courts in California have attempted to answer the question based on the California Supreme Court's guidance 20 years ago in *Rutherford v. Owens-Illinois, Inc.*, 16 Cal.4th 953 (1997). *Rutherford* held that all asbestos products are not the same and not all exposures to asbestos are sufficient to meet the substantial factor test.

But over the years, the lower courts in California have mostly lost sight of that aspect of *Rutherford*, and have permitted plaintiffs to prove causation by presenting expert testimony offering some variant of the "every exposure" theory.

Last year, for example, the court in *Davis v. Honeywell International Inc.*, 245 Cal.App.4th 477, 492-93 (2016) endorsed the admissibility of an expert's "every exposure" opinion in an asbestos case.

By refusing the grant review in *Phillips*, the California Supreme Court has, at least for now, declined to address concerns regarding the misinterpretation of its 1997 holding in *Rutherford* and the "every exposure" theory's unscientific premise that all types of asbestos are equally hazardous.

As a result, hazardous-product-exposure plaintiffs and their lawyers will intensify their focus on California courts as the venue of choice for their suits

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