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Commercial Litigation News

Illinois Supreme Court Decides That Defendants in Asbestos Exposure Cases May Now Introduce Evidence at Trial of Plaintiff's Exposure to Asbestos-Containing Products from Previously Settled, Insolvent or Dismissed Defendants

Defendants and potential future defendants in asbestos exposure cases are celebrating the recent Illinois Supreme Court decision in *Nolan v. Weil-McLain*, Docket No. 103137 (Apr. 16, 2009). At issue before the Court was the application of the so-called "Lipke rule," which arose out of the Illinois appellate court decision in *Lipke v. Celotex Corp.*, 153 Ill. App. 3d 498 (1st Dist. 1987). With *Nolan*, the Supreme Court has clarified *Lipke* and taken a significant step toward leveling the playing field for defendants in asbestos exposure cases in Illinois.

In *Nolan*, the Supreme Court determined that the *Lipke* rule has been misinterpreted and improperly expanded by Illinois appellate courts in cases like *Kochan v. Owens-Corning Fiberglass Corp.*, 242 Ill. App. 3d 781 (5th Dist. 1990), and *Spain v. Owens-Corning Fiberglass Corp.*, 304 Ill. App. 3d 356 (4th Dist. 1999), to prevent a nonsettling defendant from introducing evidence at trial that a plaintiff was exposed to the asbestos-containing products of defendants who had previously settled, were insolvent, or were otherwise dismissed from the case prior to trial.

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The central issue in the case was whether the trial court erroneously excluded evidence of the decedent's exposure to asbestos from sources other than the defendant. In discussing *Lipke*, the Supreme Court noted that, when read correctly, "*Lipke* simply holds that if a defendant's negligence proximately caused a plaintiff's harm, evidence that another's negligence might also have been a proximate cause is irrelevant—and therefore properly excluded—if introduced for the purpose of shifting liability to a concurrent tortfeasor." Where a defendant wishes to offer evidence of a plaintiff's other exposures "to contest causation through the use of the sole proximate cause defense," the *Lipke* exclusionary rule is inapplicable. To hold otherwise, the Court reasoned, would improperly remove from the jury the determination of proximate cause and deprive a defendant of its right to introduce evidence contesting proximate cause. Accordingly, the Court expressly overruled the portion of *Kochan* which holds that evidence relating to other exposure is irrelevant and overruled *Spain* in its entirety.

Indeed, the Supreme Court noted that the appellate court's erroneous interpretation of *Lipke*, as evidenced by its rulings in *Kochan* and *Spain*, "left Illinois standing alone in excluding evidence of other asbestos exposures," and conflicted with well-settled principles of tort law that the plaintiff bears the burden of proof on causation and that a defendant has the right to establish "that the conduct of another causative factor is the sole proximate cause of the injury." Ultimately, the Court found that the trial court and the appellate

court had erroneously excluded evidence of the decedent's exposure to asbestos from other sources and held that such error warranted a new trial.

The practical impact of the *Lipke* rule prior to the recent ruling in *Nolan* was to shield from jurors key facts relating to proximate causation. In most cases, the jury would be unaware that the plaintiff was employed for years in other high-exposure workplaces or environments, and instead be led to believe that the plaintiff's only exposure to asbestos came from the products manufactured by the defendant at trial. With the *Nolan* decision, Illinois now joins all other states in permitting juries to consider evidence that the defendant's product was not the proximate cause of plaintiffs' injuries because the harm was actually caused by another defendant or defendants' asbestos-containing products.

Although it is too early to tell how the *Nolan* decision will impact plaintiffs' attorneys' approach to litigating and resolving asbestos exposure claims, the logical result should be for plaintiffs' attorneys to focus their energies on those defendants whose products were a substantial source of asbestos exposure to the plaintiff rather than casting the net of defendants as wide as possible in the hopes of extracting settlements from defendants fearful of the previous exclusionary reach of the *Lipke* rule.

If you require any additional information regarding the *Nolan* decision, or any other issue related to toxic tort litigation, please do not hesitate to contact **Anthony J. Ashley** at (312) 609-7884, or any other Vedder Price attorney with whom you have worked.

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