Friction defendants, particularly truck and heavy equipment manufacturers are finding themselves becoming the primary targets in many asbestos lawsuits, and are likely left wondering why. As each new “wave” of defendants comes in, the claims and “science” supporting those claims becomes more and more specious. Plaintiffs’ attorneys have developed a surfer mentality in asbestos-related litigation. They will ride a wave until it comes in, i.e., the majority of defendants file for bankruptcy, then go out and find another “wave” of new defendants to ride in until that “wave” comes in. To understand where we are in the current litigation it is necessary to see where we have been and how we got here.

The first “wave” came many, many years ago when plaintiffs were employees of now-bankrupt entities, such as Johns-Manville, and those plaintiffs were able to bring claims against their employers for certain injuries which they allegedly sustained. With the creation of state workers’ compensation commissions, those types of claims were extinguished.

The next “wave” began around the 1960s. Plaintiffs began to bring products liability lawsuits against manufacturer defendants. These defendants consisted mainly of those who created friable insulation products, containing amphibole asbestos. Many of these plaintiffs were insulators that had been exposed as part of their occupation in construction or repair of naval ships. These lawsuits increased significantly in 1973 when the 5th Circuit Court of Appeals decided the *Borel* case, which applied a strict liability standard. Clarence Borel was an industrial insulation worker, whose employment “necessarily exposed him to heavy concentrations of asbestos dust generated by insulation materials.” *Borel* would eventually lead to the largest “wave” ever in asbestos litigation.

The next “wave” of cases began to be filed by plaintiffs that had worked with or around asbestos-containing products. The pool of plaintiffs increased exponentially in the 1980s and 1990s to include large numbers of construction and industrial factory workers that had regularly handled asbestos products or had worked near crafts that were installing, repairing or removing them. The cases filed in this “wave” consisted of two groups of plaintiffs—those with mild asbestosis and pleural plaques, and those with more severe asbestosis, lung cancer, and mesothelioma. The pool of defendants in this “wave” grew to include companies that had manufactured, distributed, sold, or applied any asbestos-containing products, not just insulation products. The defense of these claims was made more difficult when Johns-Manville Corporation and Unarco, companies which manufactured, in part, thermal insulation, concluded that their assets were not sufficient to meet their potential tort liabilities and filed for bankruptcy court protection under Chapter 11. Eventually this “wave” of defendants would drown all of the initial targets in asbestos litigation forcing them to file for bankruptcy protection.

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2 *Id.*
Rise and Fall of Mass Joinder and Non-Malignant Claims

The “wave” of non-malignant claims was a significant time in asbestos litigation history for many reasons. First, virtually every industrial worker from World War II until the late 1970s became a potential claimant. Second, hundreds of companies with little connection to asbestos found themselves engulfed by tens of thousands of claims that were being filed in tort systems throughout the country. Third, and perhaps most important to where we are today, came the procedural mechanisms that courts designed to handle that overwhelming number of claims that were being filed in their jurisdictions. Courts developed entire sets of rules in an attempt to manage the “crisis” that asbestos claims created with their dockets. In the process of setting up new rules to manage asbestos litigation, many courts abolished traditional venue, discovery and trial requirements. The courts attempted to create a system that could handle the large number of asbestos claimants; however, their changes had the reverse effect, because they seemingly always made it easier for plaintiffs’ attorneys to continue to file massive numbers of claims in these favorable venues.

A. Mass Joinder

Plaintiffs’ attorneys’ insatiable appetite lead to a search for the “next asbestos.” In their search, plaintiffs’ attorneys tried to implement similar asbestos strategies to new mass tort claims, such as pharmaceutical claims. Courts and legislatures, through heavy lobbying from business communities, began to sense that the plaintiffs’ bar would utilize methods that were designed specifically for asbestos litigation in virtually every type of litigation. This lead to sweeping tort reform changes throughout the country, which made it much more difficult to join a few strong malignant claims with colossal numbers of non-malignant claims in “magic jurisdictions.”

B. Non-Malignant Claims

Since the large number of asbestos-related bankruptcies began, plaintiffs’ attorneys have been searching for the next wave of mass tort cases. Around the early 2000s, plaintiffs’ attorneys moved to silica as their next mass tort. They utilized the same diagnosing methods that had been successful in asbestos litigation -- mass screenings. The onslaught of silica claims led to the creation of a silica MDL, to which many claims were transferred for discovery purposes. On June 30, 2005, United States District Court Judge Janis Graham Jack, issued a stinging 249-page Order regarding over 10,000 individual plaintiffs. This opinion followed three days of testimony from doctors who purportedly “diagnosed” thousands of plaintiffs with silicosis. Judge Jack condemned the mass screening process used to generate the silica claims and found that virtually every plaintiff’s diagnosis had been “manufactured for money” using methodology that was “not sufficiently reliable,” and “an ingenious method of grossly inflating the number of

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4 See Illinois Central v. Travis, 808 So.2d 928, 939 (Miss. 2002)(“[V]enue that is proper for one plaintiff is proper for all…)

positive diagnoses." This Order essentially vindicated what many asbestos defendants had been arguing for years, that non-malignant claims were diagnosed using unreliable methods.

C. Significance of Changes to Mass Joinder and Non-Malignant Filings

The combination of mass joinder and non-malignant claims had created an environment that was virtually impossible to defend against for many defendants, particularly those that had previously been considered “peripheral” defendants. For these “peripheral” defendants, the cost associated with the strategy of fighting each and every claim was simply overwhelming. The tort reform changes associated with venue and joinder, along with the alleged exposure of fraudulent diagnoses of non-malignant claims led to a huge reduction in the number of new filings. Consequently, the new “wave” of asbestos-related claims began to focus on malignant claims, and plaintiffs’ attorneys continue to ride that wave today.

**Where We Are Now and The Road Ahead**

With the reduction in the number of non-malignant and mass joined cases, the total number of new claims has rapidly declined each year. Further, with the large number of insulation companies filing for bankruptcy, plaintiffs have focused their efforts on defendants that were previously considered “peripheral”. As a result, friction defendants in asbestos litigation now find themselves as the primary focus of these cases. Further, with GM and Chrysler filing for bankruptcy protection, trucking companies are increasingly becoming a focus of plaintiffs’ friction cases.

**Car v. Truck Cases**

For defendants, there is merely a difference without distinction to the car versus truck cases. The trucking defendants are essentially asserting the same defenses that other friction defendants have been raising in prior litigation. With the reduction in the overall number of claims, friction defendants have been able to develop sound defenses by showing that epidemiology simply does not support plaintiffs’ claims that friction products are a cause of or are a substantial contributing factor to diseases such as mesothelioma.

A. Defendants’ Response to “Any Exposure” Theory, Alternatively Known as the “Every Exposure Counts” Theory

With many traditional companies filing for bankruptcy and plaintiffs’ attorneys focusing their cases on once “peripheral” defendants, plaintiffs’ experts have also had to focus their efforts on alternate theories of causation, such as the “any exposure” theory. Concisely stated, the “any exposure” theory contends that because asbestos-related diseases are a cumulative, dose-response process, every exposure to asbestos substantially contributes to the disease. The one glaring exception to the “any exposure” theory is background. Proponents of the “any exposure” theory do not attribute background exposures to the development of asbestos-related disease, though background exposures contribute millions of fibers over a person’s lifetime. This theory

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6 *Id.*
has led to friction defendants, and particularly trucking companies whose contribution to the
disease is trivial at best, being sued as primary defendants.

Unfortunately for plaintiffs, the decline of non-malignant filings has allowed defendants to
actually assert their viable defenses and defend claims, both through science and the law. This
has led to many successful challenges to the “any exposure” theory.

**Texas Supreme Court**

In *Borg-Warner Corporation v. Flores*, 232 S.W.3d 765 (Tex 2007), perhaps the most notorious
ruling to date for a friction defendant, the Texas Supreme Court rejected the testimony of Dr.
Barry Castleman that mere proof of exposure is sufficient for causation. The Texas Supreme
Court held that, “in keeping with the de minimis rule espoused in Lohrmann and required by our
precedent, we conclude the evidence of causation in this case was legally insufficient.” *Id.* at
774

**Texas MDL**

The Texas MDL has rejected testimony of Dr. Eugene Mark in friction product cases.7 Prior to
excluding Dr. Mark’s “any exposure” testimony, the Texas MDL held a three day hearing on a
motion to strike plaintiffs’ expert testimony in friction mesothelioma cases. During that hearing,
Dr. Mark’s testimony was essentially that any exposure to asbestos, however slight, can be a
causative factor in asbestos related disease. The Texas MDL court held that, “while it is true that
any exposure to an asbestos product increases risk of mesotheleoma [sic] or some other asbestos
disease, the extent to which any type of asbestos does so is not measureable nor is it scientifically
verifiable.”8 The court concluded that Dr. Mark’s testimony failed to meet standards necessary
to qualify as expert testimony against friction defendants.

**Pennsylvania Supreme Court**

In *Gregg v. VJ Auto Parts, Inc.*, 943 A.2d 216 (Pa. 2007), a mesothelioma case, the Pennsylvania
Supreme Court rejected the commonly used practice of submitting expert affidavits espousing
the “any exposure” theory. The court rejected this approach because such generalized opinions
do not suffice to create a jury question in a case where exposure to defendant’s products is de
minimus, particularly in the absence of evidence excluding other possible sources of exposure
(or in the face of evidence of substantial exposure from other sources.) *Id.* at 226, *See also Summers v. Certainteed Corp.*, 886 A.2d 240, 244 (Pa. Super.2005); *Accord Lindstrom v. A-C Product Liability Trust*, 424 F.3d 488, 493 (6th Cir. 2005) (reasoning that, if such an opinion
were permitted to control, the substantial factor test would be rendered meaningless.) The
Pennsylvania Supreme Court acknowledged that in mass tort cases, there is a willingness on the
part of some experts to offer opinions that are not fairly grounded in a reasonable belief
concerning the underlying facts and/or opinions and that are not couched within accepted
scientific methodology. *Gregg*, 943 A.2d at 226. The Court further held that, “we 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 in every “direct-evidence” case.” *Id.* at 226-227.

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8 *Id.*
Arkansas Supreme Court
In Chavers v. General Motors Corp., 79 S.W.3d 361, 370 (Ark. 2002), the Arkansas Supreme Court reasoned that, “competent medical evidence presented in this case does not support the conclusion that a one-time exposure to asbestos-containing brakes was a substantial cause of Mr. Chavers’ mesothelioma.”

Pennsylvania State Courts
Pennsylvania trial courts have rejected the “any exposure” testimony of several high profile plaintiff experts in asbestos litigation including Drs. John Maddox, Eugene Mark, William Longo and Arthur Frank in friction product cases.\(^9\) \(^10\)

Washington State Courts
Washington trial courts have also excluded opinions of Dr. Samuel Hammar and Dr. Carl Brodkin in friction cases.\(^11\)

B. “Chrysotile Defense” and “Low-Dose Defense”

Friction defendants, including trucking companies, have a distinct advantage in asbestos litigation, which is the chrysotile defense. Virtually everyone, including plaintiff experts, acknowledges that chrysotile is less potent that any other fiber that has been commercially used in the United States. In fact, during the Texas MDL Havner hearing, Dr. Mark candidly acknowledged that chrysotile asbestos was much less likely to cause asbestos-related diseases than crocidolite or amosite asbestos products.\(^12\) Courts have acknowledged different toxicities for chrysotile for many years. In Celotex Corp., v. Copeland, 471 So. 2d 533, 538 (Fla. 1985), the Florida Supreme Court acknowledged that, “asbestos products, on the other hand, have widely divergent toxicities, with some asbestos products presenting a much greater risk of harm than others.”

The fiber distinction is important for friction defendants because the difference in potency would indicate a need for a considerably higher dose to cause an asbestos related disease for mechanics. This is particularly true for cases with alternative exposures. Thus, another key component of a friction defendant’s defense is to establish alternative exposures, particularly amphibole exposures.

Plaintiffs’ attorneys have an amazing ability to adjust, as shown by their ability to shift from claims against Johns-Manville to claims against the local mom and pop brake supplier. Notwithstanding successes of friction defendants in excluding many experts in asbestos litigation, large verdicts are continually being rendered from coast to coast. For every court that excludes an expert, there is another court awarding a multi-million dollar verdict.

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\(^10\) The Pennsylvania Superior Court has reversed the Common Pleas Court’s ruling that granted summary judgment, finding the plaintiff’s expert testimony was admissible under the Frye standard; however, in a December 1, 2011 order, the Pennsylvania Supreme Court said it would address this question: “Did the Superior Court err in reversing the trial court's decision to exclude the testimony of plaintiff's experts in this friction-product asbestos case?”


Delaware
Since the first plaintiffs’ friction verdict in 2007, Delaware has seen new filings in asbestos litigation continue. In fact, as many as six mesothelioma suits are filed each month in the State Superior Court of New Castle Delaware.

California
Since tort reform was implemented in Mississippi and Texas, California has been the hot bed for asbestos litigation, including friction cases. Recent California friction verdicts have included a $17.5 million verdict in a brake lining case, a $1.6 million verdict in a friction case with several alternative exposures, and a $4.3 million verdict in a friction case against Ford.

Illinois
On March 11, 2011, an Illinois jury returned an $89.6 million verdict against four defendants after finding that three of them conspired to conceal the dangers of asbestos and that one negligently exposed a man to the asbestos that caused his mesothelioma. Two of these defendants, Honeywell International, Inc. and Pneumo Abex LLC, are typically considered “friction” defendants. This verdict, which included $9.6 million in compensatory damages against Honeywell and Pneumo Abex, and $20 million in punitive damages against Pneumo Abex, was rendered in spite of the fact that the plaintiff was a pipefitter, not a mechanic. Instead, the plaintiff had claimed the defendants conspired to conceal information about the health risks of asbestos from their employees, customers and others.

Maintaining Control While Navigating Your Defense

If the recent verdicts, both good and bad, represent the roads ahead for friction defendants, then the important thing for these defendants is to maintain control of their case and defenses on those roads, most importantly in unfavorable jurisdictions. The aforementioned verdicts show that in spite of success in certain jurisdictions, each case should be carefully examined in order to determine how to best be defended. Particularly in unfavorable jurisdictions, defendants should be prepared not only to defend with traditional encapsulation and de minimus defenses, but should look to establish alternative exposures. It is important to remember that exposure to asbestos can come from the most unexpected sources, even from water and beer. Friction defendants should look to household exposures, and exposures to amphibole fibers, such as those found in now-banned friable insulation products, through other employment and activities to establish alternate theories of causation. It is important to remember that if your client’s product did not cause the plaintiff’s injury, the jury needs to know whose did.